

# A HOSTILE ENVIRONMENT FOR STUDENT DEFENDANTS: TITLE IX AND SEXUAL ASSAULT ON COLLEGE CAMPUSES

Stephen Henrick\*

*[The federal government] has determined that the College addressed the complainant's allegation of sexual assault by assisting with the police investigation. The College was under no obligation to conduct an independent investigation of the alleged sexual assault, as it involved a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.*<sup>1</sup>

## **Preface**

Many of the numerous articles written about Title IX's applicability to claims of sexual assault on college campuses frame the issue in terms of the struggle of (female) rape survivors to overcome an entrenched patriarchal culture that condones violence and is otherwise indifferent to women.<sup>2</sup> Empowering victims of sexual violence to seek justice is critically important, and the author fully supports gender equality in all aspects of life including higher education. The author nevertheless takes three approaches to Title IX in this paper, which should not be confused with a lack of concern for the feminist ideals reflected in other publications. First, the author uses gender-neutral pronouns to describe both alleged perpetrators of sexual violence and alleged survivors in recognition of the fact that both men and women can suffer and commit such acts. Second, he uses the label "complainant" instead of "victim" or "survivor" to recognize that student defendants are, and should be, presumed innocent until proven otherwise. Finally, and most fundamentally, the author seeks to shift the reader's focus to the rights of accused students in campus disciplinary processes for sexual misconduct because he believes the attainment of Title IX's noble goals cannot come at the expense of the civil rights of innocent people. Those who might be inclined to dismiss the author's viewpoint or the remedy he advocates as insensitive to the needs of rape survivors or somehow anti-feminist should keep an open mind as they read. Also, readers should consider what they would feel if they or a loved one were falsely or erroneously accused of sexual assault and subject to the current standard campus operating procedures outlined herein. If the reader cannot say with confidence that an accused student would get a fair trial if charged with sexual assault, is it justifiable to allow colleges and universities to continue adjudicating such offenses?

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\* J.D., *magna cum laude*, Harvard Law School. The author wishes to thank the following people for helping to shape his thoughts and objectives while writing this paper: Professor Jeannie Suk, Professor Martha Chamallas, Hans Bader, Ellen Berkman, Joseph Hall, Max Levine, Sochet Phoeun, and his parents, Randy and Joanne Henrick.

<sup>1</sup> United States Department of Education ("DOE") Office for Civil Rights ("OCR"), Letter of Resolution in Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005). As explained *infra* Part II(C), the DOE issued a letter in April 2011 that both purports to disavow this position while simultaneously claiming that the letter is not a change in law or OCR's enforcement policy.

<sup>2</sup> See, e.g., Diane Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J. L. & GENDER 407, 421 (2008) (claiming that "schools will often privilege the rights of their profit-generating football players over the rights of their female students" in sexual violence cases involving student-athletes).

## I. Introduction

In April of 2011, the U.S. Department of Education's Office for Civil Rights ("OCR") issued a "Dear Colleague" letter ("the Letter") to all institutions under its purview, addressing sexual violence in educational programs and activities.<sup>3</sup> The Letter is OCR's first publication focusing primarily on instances of student-against-student rape and sexual assault in school settings; among other innovations, it lays out specific procedures educators must now follow in investigating and resolving these claims.<sup>4</sup> While some have "applaud[ed]" the Letter<sup>5</sup> and others have expressed concern with its implications,<sup>6</sup> almost all commentators agree that it is one of the most significant developments in the current body of law governing claims of sexual violence on college campuses. Given the extraordinary impact that these policies have on the lives of thousands of students each year, this paper will examine the Letter and the forty years of administrative and judicial development preceding it to determine whether colleges and universities are the most effective adjudicators of sexual assault and rape allegations. Unfortunately, institutions of higher learning are hindered by several powerful and problematic incentives to falsely convict accused students in these types of cases.<sup>7</sup> Removing claims of sexual violence from college campuses to civil and criminal judicial systems is the only viable way to fix the problem and ensure that sexual assault adjudication is equitable and impartial for all affected parties.<sup>8</sup>

By way of background, the Letter represents the latest interpretation of Title IX of the Educational Amendments of 1972. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>9</sup> As the wording suggests, Title IX was not originally designed to adjudicate claims of sexual violence on college campuses; nothing in its legislative history and first seven years of existence suggests an intent to reach claims of sexual misconduct in any setting. In 1979, however, Catharine Mackinnon published a groundbreaking book arguing that "sexual harassment" is a form

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<sup>3</sup> "Dear Colleague" Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education (Apr. 4, 2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter April 4, 2011 Letter]. For purposes of this Letter, OCR has jurisdiction over any college or university receiving federal funding.

<sup>4</sup> *See infra* Part II(C).

<sup>5</sup> *NCHERM Reaction to the April 4<sup>th</sup>, 2011 OCR Dear Colleague Title IX Guidance on Campus Sexual Assault*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT., <http://www.ncher.org/documents/NCHERMReactiontotheDearColleagueLetter4.6.11.pdf>.

<sup>6</sup> Letter from Will Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education Office for Civil Rights, May 5, 2011, *available at* <http://thefire.org/article/13142.html>.

<sup>7</sup> For details as to the incentives universities face to convict based on OCR's administrative enforcement, including OCR's ability to terminate an institution's federal funding and OCR's current obsession with complainant rights at the expense of fairness for accused students, *see infra* Parts II(A) and (C). For information regarding the incentives for conviction created from the imbalance of power between alleged victims of sexual violence and alleged perpetrators vis-à-vis bringing civil damage claims against colleges, *see infra* Parts III(A) and (B).

<sup>8</sup> For a more detailed examination of why colleges are inherently incapable of resolving claims of sexual violence between students, *see infra* Part IV(A). For a response to some of the common arguments as to why colleges must handle these allegations anyway, *see infra* Part IV(B).

<sup>9</sup> 20 U.S.C. § 1681 (2012).

of sex discrimination.<sup>10</sup> Over the next thirteen years, OCR issued administrative guidance prohibiting school employees from sexually harassing students<sup>11</sup> and the Supreme Court expanded Title IX's private right of action to allow suits for money damages in teacher-to-student harassment cases.<sup>12</sup> By 2000, both OCR and the Supreme Court had also expanded Title IX's harassment prohibitions to include cases of student-to-student conduct in higher education settings.<sup>13</sup>

Sexual harassment under Title IX is “unwelcome conduct of a sexual nature,” subject to caveats that the behavior must be serious enough to impact the survivor's access to educational opportunities by creating a hostile environment.<sup>14</sup> The definition encompasses a wide range of activities, including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature” such as posting sexual materials in classrooms.<sup>15</sup> At its most extreme, “sexual harassment” also encompasses allegations of sexual violence between students.<sup>16</sup> A felony-equivalent claim that a student suffered a rape, sexual assault or sexual battery at the hands of a classmate is certainly “unwelcome conduct of a sexual nature,” to understate the issue.

Under Title IX, schools are required to conduct a “prompt, thorough, and impartial” investigation into any allegation of rape or sexual assault reported on campus.<sup>17</sup> If the school finds that harassment occurred, administrators must stop the behavior, prevent its recurrence, and remedy its effects on the victim (including, as needed, by disciplining the harasser).<sup>18</sup>

Like any statutory right, Title IX is only as effective as the remedy it provides for a school's noncompliance. Title IX has a dual enforcement scheme: someone who claims to have been a victim of sex discrimination, i.e., a “complainant,” can both sue his or her educational institution directly in civil court and also file a complaint with OCR, a federal executive agency with the power to terminate the federal funding of any institution that violates the statute.<sup>19</sup>

This paper begins in Part II by examining OCR's Title IX administrative enforcement. Part II draws upon significant original research, including more than 220 administrative enforcement decisions from OCR's national headquarters and twelve regional offices obtained via Freedom of Information Act requests. Most of these decisions have never before been published or examined in academic literature, and they provide an inside look at how OCR operates and carries out its mandate to enforce Title IX on college campuses. This section also traces the history of Title IX

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<sup>10</sup> CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 143-49 (1979). Although some scholars reject the idea that sexual harassment is *per se* discriminatory in nature, see Michael S. Greve, *Sexual Harassment: Telling the Other Victims' Story*, 23 N. KY. L. REV. 523, 540 n.45 (1996), the law is now well-settled that it is.

<sup>11</sup> *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) (citing OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)).

<sup>12</sup> *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

<sup>13</sup> See *infra* Part III(A).

<sup>14</sup> U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2* (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 GUIDANCE].

<sup>15</sup> *Id.*

<sup>16</sup> Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 207-10 (2011).

<sup>17</sup> 2001 GUIDANCE, *supra* note 14, at 15.

<sup>18</sup> *Id.* at 12-13, 16.

<sup>19</sup> See *infra* Part II.

by examining the agency's various guidances and directives, reviewing every major OCR publication from the year of Title IX's enactment in 1972 to the latest Letter of April 4, 2011.

As noted *infra*, OCR's primary concern is now decidedly the rights of complainants. Since 1997, the agency has devoted little if any time to ensuring that sexual assault hearings are "equitable"<sup>20</sup> and "impartial"<sup>21</sup> for both the defendant and the complainant, despite the fact that OCR's mission is exactly that. Over the years, OCR has issued a series of publications that escalate complainant rights and mandate new procedures for resolving complaints in a way that does not sufficiently protect the due process rights of falsely accused students. Beginning with OCR's first sexual harassment guidance dealing with student-to-student harassment, which has remained in effect with limited modification since 2001, these procedures have limited complainant control of the grievance process and conflicted with accused student constitutional rights. The April 4, 2011 Letter added still more rights and protections for complainants, such as a mandatory "preponderance of the evidence" standard for all campus tribunals and new evidentiary and appeal rules. This Letter also included a new provision that complainants (but not accused students) must be notified of their legal rights.

While OCR has issued these formal policy documents, actual enforcement is frequently inconsistent as Part II explains, with various offices resolving similar issues in different and often conflicting ways. Nevertheless, administrative enforcement decisions like the often-cited case of Sonoma State University<sup>22</sup> strongly suggest that anti-due-process ideological biases can be present in OCR enforcement officers, and individual cases can go further than OCR policies in deciding what Title IX requires. In some instances, and in total violation of basic principles of double jeopardy, OCR has also enticed schools to re-examine an acquitted student without notice to him or her until the second investigation begins.<sup>23</sup>

The net effect of the administrative enforcement scheme is that schools have an incentive to convict anyone who is charged with sexual assault or rape as a matter of risk aversion for the institution. As noted, OCR has the authority to revoke a college's federal funding if it finds the institution violated Title IX (although OCR has never exercised that power). For some schools, the sums at stake exceed half a billion dollars. Because OCR primarily cares about the complainant's rights, as evidenced by its guidances and enforcement opinion letters, conviction carries a much lower risk of administrative enforcement than acquittal.

As Part III notes, legal rights for complainants and accused students in civil court further compound a university's incentive to convict in every case. Under Title IX, a school's deliberate indifference to a complainant's claim that he or she was raped or sexually assaulted is automatically an actionable violation for money damages. Deliberate indifference to an accused student's innocence, by contrast, is not actionable absent further proof of sex discrimination (which for all practical purposes is impossible to muster). Schools thus only face liability exposure to complainants under Title IX, meaning conviction does not carry any risk of significant penalty. The exposure is all the more compelling because of its potential magnitude: in recent years, Title IX suits have led to six-figure settlements in at least three cases.

Nor do accused students have any meaningful guarantees outside of Title IX's framework that a school would have to weigh as a counterbalance to the threat of litigation from a

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<sup>20</sup> 34 C.F.R. § 106.8(b) (2012).

<sup>21</sup> 2001 GUIDANCE, *supra* note 14, at 15.

<sup>22</sup> Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994).

<sup>23</sup> See *infra* Part II(D).

complainant. Approaches an accused student could use to challenge unfair discipline for sexual misconduct, such as alleging breach of contract or a due process violation, rarely if ever succeed and are subject to minimal damage awards. As a result, schools providing the bare minimum processes without sufficient procedural safeguards have little to fear from students who are subject to biased or erroneous proceedings.

Quite simply, the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false convictions. Part IV concludes that the only viable reform is to leave claims of rape and sexual assault to the professionalism and impartiality of civil and criminal courts. Courts, unlike universities, lack direct financial incentives to convict or acquit and can thus judge cases properly. Similarly, the actors in a court system such as jurors drawn from the community do not have career ambitions that are readily tied to the verdict in sexual assault trials (in contrast to college officials). Furthermore, judicial systems do not have inherent reputational interests that come into play during sexual assault adjudication, unlike their university counterparts. Finally, courts are less susceptible to bias and ideological prejudice than are campus disciplinarians because courts diffuse power and accountability across a number of independent actors and institutions while simultaneously imposing fair and impartial adjudication procedures before a case arises.

Although there are a number of criticisms that might militate in favor of attempting to reform university adjudication of sexual violence instead of abolishing it outright, none of them are sufficiently persuasive to allow the present system to continue. As Part IV explains, nothing about an institution's mandate to provide an educational environment that is free from sex discrimination requires it to actually adjudicate rape or sexual assault claims (and analogies to the contrary from Title VII are inapposite). Furthermore, concerns about the underreporting of sexual assault or speculations about the frequency of false or mistaken complaints cannot justify imposing a system of adjudication in which innocent people are prone to conviction for offenses they did not commit. Nor can claims about the uniqueness of university discipline or academic freedom justify the status quo. Finally, if the court system is still not up to the task of handling rape and sexual assault, reform efforts should focus on making it fair and accessible for everyone.

## **II. Administrative Enforcement of Title IX**

### **A. Background**

OCR's administrative enforcement begins upon receipt of a complaint alleging that a college or university has violated Title IX. OCR investigates and, to the extent the institution is in violation, attempts to secure voluntary compliance. If those efforts fail, OCR has the authority to refer the institution to the Justice Department for criminal prosecution and/or to begin proceedings to terminate the institution's federal funding.

In practice, OCR's Title IX enforcement rarely if ever becomes adversarial. In fact, OCR has never once used its power to terminate funds.<sup>24</sup> Given the amount of federal money most

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<sup>24</sup> See Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 88 n.2 (D.D.C. 2003); Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0>.

universities receive, the threat of losing it is enough to secure “voluntary” compliance with OCR’s requests.<sup>25</sup>

Importantly, OCR’s jurisdiction does not extend to individual students. OCR can only investigate the university as a recipient of federal funding; it does not have the authority to directly punish or sanction an accused student in any way, leaving that up to the institution itself.<sup>26</sup>

Eight key documents from the past forty years reflect OCR’s administrative Title IX policy:

- A 1981 memorandum that was OCR’s first foray into sexual harassment law;
- Four versions (1988, 1995, 1997, and 2008) of an OCR pamphlet titled “Sexual Harassment: It’s Not Academic”;<sup>27</sup>
- 1997 and 2001 Guidances OCR issued via notice-and-comment rulemaking concerning student-to-student sexual harassment; and
- The Letter OCR issued on April 4, 2011 purporting to clarify existing requirements in the 2001 Guidance that pertain to claims of rape or sexual assault.

The above documents are written in a style that is at best dense, vague, and self-contradictory,<sup>28</sup> and all focus primarily on the rights of complainants. In fact, despite its legal duty to ensure that college sexual assault adjudications are “equitable”<sup>29</sup> and “impartial”<sup>30</sup> to all parties including the accused, OCR has never defined a university’s obligation to provide due process protections for student defendants except to say that doing so should “not restrict or unnecessarily delay” a complainant’s Title IX rights.<sup>31</sup> OCR’s enforcement seems predicated on an unspoken and rather naive assumption that all complaints of harassment are brought in good faith; there is no OCR publication or federal regulation mandating any punishment for false accusations of rape or sexual assault (no matter how malicious or injurious to the reputation and academic standing of the accused).

## **B. OCR’s Policy Guidance: 1972-April 3, 2011**

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<sup>25</sup> For example, Yale’s federal funding totaled \$510.4 million in 2010, and the University of Illinois received roughly \$600 million (which accounted for almost a fifth of its entire operating revenue). YALE UNIV., FINANCIAL REPORT 2009-2010, <http://www.yale.edu/finance/controller/resources/docs/finrep09-10.pdf>; Def.’s Mot. To Stay J. Pending Appeal at ¶ 28, Chi. Trib. Co. v. Univ. of Ill. Bd. of Trs., Case No. 10 C 0568 (N.D. Ill. Apr. 12, 2011), <http://www.uillinois.edu/our/news/2011/April12.Motiontostay.pdf>.

<sup>26</sup> See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

<sup>27</sup> OCR has required schools to conform their sexual harassment procedures to this pamphlet. *E.g.*, Vatterott College, OCR Complaint No. 07-10-2034 (Aug. 26, 2010).

<sup>28</sup> See, *e.g.*, 2001 GUIDANCE, *supra* note 14, at 9 (advising that a student’s immediate reaction after experiencing alleged harassment is both relevant and irrelevant in determining whether a hostile environment exists, and also advising that the timeliness of a harassment complaint both does and does not go to the complainant’s credibility). See also Grayson Sang Walker, Note, *The Evolution and Limits of the Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 103-04 (2010).

<sup>29</sup> 34 C.F.R. § 106.8(b) (2012).

<sup>30</sup> 2001 GUIDANCE, *supra* note 14, at 15.

<sup>31</sup> See *id.* at 22; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12045 (finalized Mar. 13, 1997) [hereinafter 1997 Guidance]; April 4, 2011 Letter, *supra* note 3, at 12.

From Title IX’s passage in 1972 until 1997, OCR never claimed authority over rape or sexual assault between students. OCR’s 1981 memorandum defined “sexual harassment” as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, *by an employee or agent of the recipient* [of federal funding], that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.”<sup>32</sup> Similarly, both the 1988 and 1995 versions of “Sexual Harassment: It’s Not Academic” disclaimed any Title IX applicability to student-to-student allegations.<sup>33</sup>

The 1988 and 1995 versions also valued complainant control of the sexual harassment grievance process. Both emphasized that “[a]n exemplary procedure would provide the [complainant] with a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint *with its required subsequent investigation and resolution*,” implying that not every complaint of sexual harassment had to end with a full-dress formal investigation.<sup>34</sup> OCR advised colleges to offer students several alternative courses of action beyond pursuing charges, including doing nothing, taking personal action such as sending a letter to the alleged harasser, or requesting informal third-party mediation (with no qualifications that an incident of “severe” harassment could not be mediated should the complainant want it to be).<sup>35</sup>

Furthermore, the pamphlets stressed that those accused of sexual harassment have rights. They each pointed out that sexual harassment is an “especially sensitive nature of . . . sex discrimination,” and emphasized that “[i]nvestigating sexual harassment complaints often requires inquiries into interpersonal relations and may also involve professional ethics, behavior and judgment. Awareness of and sensitivity to the potentially negative effect on the lives and careers *of both parties involved* is of great importance in handling an investigation.”<sup>36</sup> In keeping with the goals of fairness and sensitivity, both pamphlets also asked of institutional grievance procedures, “[i]s every effort made to protect the confidentiality of the parties?”<sup>37</sup>

In 1997, however, Title IX policy changed with the issuance of OCR’s new Sexual Harassment Guidance and revised Pamphlet. The 1997 Guidance dispensed with complainant control of the grievance process, stating that “[i]n some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”<sup>38</sup> (Notably, because the Guidance does not define “sexual assault,” the mere label a complainant attaches to an encounter could preclude mediation.)<sup>39</sup> The 1997 version of “Sexual Harassment: It’s Not Academic” similarly

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<sup>32</sup> *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 (5th Cir. 1996) (emphasis in original) (quoting OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)). *See also* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 663 (1999) (“For the first 25 years after the passage of Title IX – until 1997 – [OCR’s] regulations drew the liability line, at its most expansive, to encompass only those to whom the school delegated its official functions.”).

<sup>33</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *SEXUAL HARASSMENT: IT’S NOT ACADEMIC 2* (1988) [hereinafter 1988 PAMPHLET]; U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *SEXUAL HARASSMENT: IT’S NOT ACADEMIC 2* (1995) [hereinafter 1995 PAMPHLET] (both quoting OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981)).

<sup>34</sup> 1988 PAMPHLET, *supra* note 33, at 4 (emphasis added); 1995 PAMPHLET, *supra* note 33, at 3 (emphasis added).

<sup>35</sup> *See* 1988 PAMPHLET, *supra* note 33, at 3-4; 1995 PAMPHLET, *supra* note 33, at 2-3.

<sup>36</sup> 1988 PAMPHLET, *supra* note 33, at 3, 5 (emphasis added); 1995 PAMPHLET, *supra* note 33, at 2-3 (emphasis added).

<sup>37</sup> 1988 PAMPHLET, *supra* note 33, at 9; 1995 PAMPHLET, *supra* note 33, at 6.

<sup>38</sup> 1997 Guidance, *supra* note 31, at 12045.

<sup>39</sup> “Sexual assault” has varying definitions in different jurisdictions. *See* *AEQUITAS: THE PROSECUTOR’S RESOURCE ON VIOLENCE AGAINST WOMEN, STATUTORY COMPILATION: RAPE AND SEXUAL ASSAULT LAWS* (2009).

mandated that “if a school receives information that sexual harassment may have occurred, the school should move quickly to determine what happened,” no matter what the complainant requests be done.<sup>40</sup>

Furthermore, although portions of the 1997 Guidance were supportive of student defendants, other parts curtailed rights of the accused.<sup>41</sup> For example, one section required a school to process a sexual assault allegation even if criminal charges are pending for the same incident<sup>42</sup> (although subsequent OCR decisions have inexplicably declined to enforce that policy).<sup>43</sup> The 1997 Guidance could thus force accused students to choose between a rock and a hard place:

Because college disciplinary boards generally do not afford a right against self-incrimination, the accused may be forced to testify or face expulsion. Statements made by the accused during the hearing, or to the investigating dean, may then be used against the student in the criminal case, even though he could not have been forced to testify in the criminal trial itself.<sup>44</sup>

In this way, the Guidance could potentially conflict with an accused student’s constitutional right against self-incrimination.

OCR’s most current Revised Sexual Harassment Guidance (2001) did not fix these problems.<sup>45</sup> In fact, despite specific requests to “expand and strengthen” due process rights, OCR merely opted for a new heading (“Due Process Rights of the Accused”) while using language from the 1997 Guidance in a slightly rearranged form.<sup>46</sup> By 2008, “Sexual Harassment: It’s Not

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[http://www.nsvrc.org/sites/default/files/Statutory\\_Compilations\\_Rape\\_and\\_Sexual\\_Assault\\_Laws-2009.pdf](http://www.nsvrc.org/sites/default/files/Statutory_Compilations_Rape_and_Sexual_Assault_Laws-2009.pdf) (last visited Nov. 19, 2012).

<sup>40</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 10 (1997). Academic research suggesting that many sexual assault survivors do not report their experiences undoubtedly contributed to these policies. See, e.g., BONNIE S. FISHER, FRANCIS T. CULLEN, AND MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

<sup>41</sup> One part advised that “because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser,” 1997 Guidance, *supra* note 31, at 12037, while another stated that students at both public and private colleges have rights (albeit implying that those rights must not restrict or unnecessarily delay the Title IX rights of the complainant), *id.* at 12045.

<sup>42</sup> *Id.* at 12045. In applying this rule, OCR has at least stated that “investigations into sexual assault allegations may be delayed for reasonable periods of time when criminal investigations are simultaneously underway and institutions do not want to interfere with those proceedings.” Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006).

<sup>43</sup> Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005).

<sup>44</sup> Paul E. Rosenthal, Note, *Speak Now: The Accused Student’s Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1252 (1997).

<sup>45</sup> See 2001 GUIDANCE, *supra* note 14, at 21 (stating that it would keep the preclusion of voluntary mediation in sexual assault cases and the requirement that a school investigate even while criminal charges are pending).

<sup>46</sup> See *id.* at viii, 22; 1997 Guidance, *supra* note 31, at 12045. The 2001 version ends with an admonition to respect accused rights, rather than ending as the 1997 version did with a caveat that accused rights should not unduly delay the rights of the complainant.



Academic” did not mention the accused at all, except to say: “[i]t also may be appropriate to counsel the harasser to ensure that he or she understands that retaliation is prohibited.”<sup>47</sup>

Defenders of the Guidances might argue that precluding the voluntary mediation of sexual assault complaints and requiring an investigation of all sexual harassment allegations (irrespective of the complainant’s wishes or pending criminal charges) are good developments, even though they infringe on complainant autonomy and accused student rights. These commentators would likely say such policies lead to justice for survivors who are too traumatized or intimidated to come forward voluntarily. They would probably also argue that these developments help ensure that victims can find timely vindication before the students have graduated or sacrificed their college careers waiting for the court process to conclude. As scholars have noted in the context of domestic violence, however, one-size-fits-all requirements and mandatory “no-drop” provisions are debatable in terms of their fairness and effectiveness.<sup>48</sup> Some complainants would also contest the idea that they need the government to inform them of their own best interests; in one recent case, for example, a complainant so rejected Title IX’s demand for colleges to handle cases while criminal charges were pending that she went to court to try to enjoin her school’s process until after the criminal proceedings had concluded.<sup>49</sup>

### C. OCR Policy Guidance: April 4, 2011-Present

OCR’s latest pronouncement on Title IX and sexual violence, the April 4, 2011 Dear Colleague letter, perpetuates and also exacerbates the problems of the 2001 Guidance. The Letter suffers from drafting defects and a failure to conform to the laws governing administrative rulemaking. As will be explained, it also effectuates a presumption that all accused students are guilty and institutes four reforms that will increase convictions without regard to guilt or innocence: (1) lowering the burden of proof in campus sexual assault trials to “preponderance of the evidence,” (2) establishing suspect evidentiary rules, (3) requiring schools to inform only complainants of their legal rights, and (4) giving a college’s Title IX coordinator unbridled discretion to revise any sanction issued in a sexual assault proceeding. As applied, the Letter’s requirement that those who handle sexual assault proceedings have “training” also poses grave concerns for accused student rights.

To begin, the Letter is sloppy and hastily drafted.<sup>50</sup> Page five of the Letter imposes two contradictory obligations on schools at once, stating that “[i]f the complainant requests

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<sup>47</sup> U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 15 (2008). The 1997 version of “Sexual Harassment: It’s Not Academic” had already dropped all language from the 1995 version about the need to be sensitive to the potentially negative effects of a sexual harassment investigation.

<sup>48</sup> See generally Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003).

<sup>49</sup> See *Stefanowicz v. Bucknell Univ.*, No. 10-CV-2040, 2010 U.S. Dist. LEXIS 106333, 2010 WL 3938243 (M.D. Pa. Oct. 5, 2010).

<sup>50</sup> The Letter’s poor quality is perhaps explained by the fact that it had to be published in time for President Obama to announce his candidacy for reelection and for Vice President Biden to speak about sexual assault on college campuses, both of which occurred on the same day it was released. See Michael D. Shear, *Obama Begins Re-Election Facing New Political Challenges*, N.Y. TIMES (Apr. 4, 2011, 6:24 PM), <http://thecaucus.blogs.nytimes.com/2011/04/04/obama-launches-re-election-facing-new-political-challenges>; Cathy Young, *Sexual Assault on Campus—Is It Exaggerated?*, MINDINGTHECAMPUS.COM (Apr. 18, 2011), [http://www.mindingthecampus.com/originals/2011/04/\\_by\\_cathy\\_young\\_1.html](http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html) (“On the same day, April 4, Vice

confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation” (emphasis added). One has to wonder, how is a school supposed to investigate consistent with a complainant’s request that no investigation happen?

While OCR’s puzzling requirement might have been clarified via feedback from notice-and-comment rulemaking, OCR did not employ that procedure in promulgating the Letter (in contrast to its promulgation of both the 1997 and 2001 Guidances). At least one law professor at Cornell University has noted that OCR’s refusal to use notice-and-comment rulemaking means the Letter has no legal authority whatsoever.<sup>51</sup> Furthermore, even though OCR justified its actions by claiming that the Letter “does not add requirements to applicable law,”<sup>52</sup> at least three different facts demonstrate that the Letter does impose new legal obligations. First, while the Supreme Court and OCR have previously held that schools have no obligation to investigate or respond to harassment that takes place off-campus and outside of an educational program or activity,<sup>53</sup> page four of the Letter now states “[i]f a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures” and “[t]he school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates” (emphasis added). Second, even though OCR has stated that “there is no requirement under Title IX that a recipient provide a victim’s right of appeal,”<sup>54</sup> page twelve of the Letter admonishes “if a school provides for appeal of the findings or remedy, it must do so for both parties.” Finally, portions of the Letter contain requirements that OCR has not defined, a fact that raises considerable questions as to how those requirements could have predated the letter.<sup>55</sup>

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President Joe Biden kicked off a nationwide ‘awareness campaign’ on schools’ obligations toward victims in a speech at the University of New Hampshire.”).

<sup>51</sup> Michael Linhorst, *Rights Advocates Spar Over Policy on Sexual Assault*, CORNELL DAILY SUN (Apr. 4, 2012), <http://www.cornellsun.com/section/news/content/2012/04/04/rights-advocates-spar-over-policy-sexual-assault> (quoting a letter from Professor Cynthia Bowman stating that OCR’s letter “is not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law”).

<sup>52</sup> April 4, 2011 Letter, *supra* note 3, at 1 n.1. As OCR knows, notice-and-comment rulemaking is required of agencies seeking to overrule past practices and establish new substantive rules. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); Ari Cohn, *Did the Office for Civil Rights’ April 4 ‘Dear Colleague’ Letter Violate the Law?*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 12, 2011), <http://thefire.org/article/13547.html>.

<sup>53</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999) (“[B]ecause the harassment must occur ‘under’ ‘the operations of’ a funding recipient . . . the harassment must take place in a context subject to the school district’s control . . .”); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2009); Oklahoma State University, OCR Complaint No. 06-03-2054 (June 10, 2004) (“A University does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the recipient.”). See also *Lam v. Curators of the Univ. of Mo.*, 122 F.3d 654 (8th Cir. 1997) (holding that a professor’s off-campus sexual harassment of a student in his private practice was not actionable under Title IX).

<sup>54</sup> University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006); *accord* Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“[A]ppeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University.”); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996) (approving a school’s limiting appeal rights to the accused because “he/she is the one who stands to be tried twice for the same allegation”).

<sup>55</sup> For example, page 18 tells schools to “conduc[t], in conjunction with student leaders, a school or campus ‘climate check’ to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence” without defining the term “climate check.”

Of course, the Letter's most problematic aspect is its formalization of a presumption of guilt in campus adjudications. Part of the problem comes from what OCR does not say. Just two sentences out of the Letter's nineteen pages discuss due process protections for only those defendants fortunate enough to attend state universities.<sup>56</sup> OCR's language implies that the rights of accused students at public colleges do not merit lengthy discussion and further suggests by negative implication that accused students at private institutions, which are still subject to Title IX, do not have any rights at all.<sup>57</sup> The Letter also states that "[w]hen taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain." In other words, alleged perpetrators should automatically suffer life-upending punishments like expulsion from their residences upon accusation because they are likely guilty. The writing on the wall from this treatment of due process rights is unmistakable: it implies, "oddly and ominously, that the statutory rights of the accuser trump the constitutional due-process [sic] rights of the accused."<sup>58</sup>

To effectuate its new presumption, the Letter institutes four procedural reforms of campus sexual assault trials that will lead to increased convictions, irrespective of an accused student's guilt or innocence. First, pages ten and eleven mandate a new burden of proof of "preponderance of the evidence"—the lowest possible threshold. A broad consensus of those involved in university adjudication, including the Committee on Women in the Academic Profession of the American Association of University Professors, would argue that this burden is inappropriately low.<sup>59</sup> So would Congress, which has already rejected legislation that would lower the burden<sup>60</sup> as OCR has done and appears poised to do again.

Second, the Letter establishes a quasi-code of procedure that raises serious constitutional concerns. Page eleven, note twenty-nine, admonishes that "[a]ccess should not be given to privileged or confidential information . . . [such as] communications between the complainant and

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<sup>56</sup> April 4, 2011 Letter, *supra* note 3, at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.").

<sup>57</sup> As explained *infra* Part III(B), a student's theoretical right to have a college follow its own procedures as a matter of contract law is almost never an adequate safeguard against wrongful discipline.

<sup>58</sup> Wendy Kaminer, *Sexual Harassment and the Loneliness of the Civil Libertarian Feminist*, THE ATLANTIC (Apr. 6, 2011), <http://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887/>.

<sup>59</sup> See Letter from Ann E. Green, Chair of the Committee on Women in the Academic Profession of the American Association of University Professors, to Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Department of Education Office for Civil Rights (Aug. 18, 2011), available at <http://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightslatter.pdf>; James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2159 n.117 (1987) (citing Nicholas Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71 (1985)) ("Courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of 'clear and convincing' evidence.").

<sup>60</sup> The Campus SaVE Act, which would have required "preponderance of the evidence" in sexual assault hearings, was introduced yet died in committee during the 111<sup>th</sup> Congress 2009-2010 "lame duck" legislative session. See H.R. 6461, 111th Cong. (2010). Although reintroduced in the 112<sup>th</sup> Congress, it has been stalled in committee since April 14, 2011. See S. 834, 112th Cong. (2011). Senator Patrick Leahy also dropped language from the 2011 reauthorization of the Violence Against Women Act that would have codified preponderance of the evidence in campus trials. *Threat to Student Due Process Rights Dropped from Draft of Violence Against Women Act*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Nov. 14, 2011), <http://thefire.org/article/13852.html>.

a counselor,” without defining whose law determines what information is considered “privileged” or who is a “counselor.”<sup>61</sup> Notably, the provision includes “information regarding the complainant’s sexual history” (albeit without defining what that phrase means). Because an accused student cannot introduce evidence to which s/he has not been given access, this provision presumably operates as a new de facto rape shield law for college disciplinary proceedings. While Federal Rule of Evidence 412 bars the introduction of a complainant’s sexual history in court, both legislative and constitutional exceptions exist.<sup>62</sup> The Letter, by contrast, does not mention exceptions of any kind. Will the Letter’s evidentiary policy apply to discipline at public universities in a manner that is consistent with accused student constitutional rights?

Third, the Letter creates a mismatch in all proceedings by requiring schools to inform only complainants of their legal rights. Page sixteen orders schools to “ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental services, and their right to file a complaint with local law enforcement,” without specifying that accused students, too, are entitled to similar notice.<sup>63</sup> Such an imbalance of notice is hardly equitable.

Finally, complainants now have a new right to request a supreme review of all sanctions in sexual harassment cases. In seeming contrast to the requirement at page 12 that appeals of remedies for sexual harassment be equal for both accused and complaining students, page 18 now gives the college’s Title IX coordinator jurisdiction over all discipline to determine if “the complainant is entitled to a remedy under Title IX that was not available through the disciplinary committee” (without specifying any criteria to gauge the Title IX coordinator’s exercise of discretion or stating that the accused is entitled to any similar kind of review).

It is also worth noting that although OCR’s vague requirement insisting upon “training” for those who adjudicate claims of sexual violence<sup>64</sup> sounds reasonable and consistent with past practices, it poses a strong threat to accused student rights. From instructing their Title IX coordinators to revising their misconduct procedures, over 800 educational institutions have turned to the National Center for Higher Education Risk Management (“NCHERM”) for guidance.<sup>65</sup> NCHERM’s founding partner, Brett Sokolow, a self-described sexual assault activist, has

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<sup>61</sup> Federal and state law diverge on privileges as federal courts do not recognize a reporter’s privilege. See *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 970 (D.C. Cir. 2005) (citing *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972)). It could be argued that Title IX applies federal law regarding privilege to define this term in the April 4, 2011 Letter because Title IX is a federal statute, but it could just as easily be that the law of the state where the college is located controls.

<sup>62</sup> See FED. R. EVID. 412; *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (identifying the “constitutionally protected right of cross-examination” as subject to a trial judge’s discretion to prevent unduly harassing interrogation).

<sup>63</sup> Similarly, many schools have a “women’s center” that supports complainants (among other activities) without any institution akin to a public defender’s office to provide support to the accused. See, e.g., *NWSA Campus Women’s Center Database*, NAT’L WOMEN’S STUDIES ASS’N, 72.32.34.202/research/centerguide/index.php (last visited Nov. 23, 2012) for a list of such centers.

<sup>64</sup> See April 4, 2011 Letter, *supra* note 3, at 12 n.30 (stating that “[i]f an investigation or hearing involves forensic evidence, that evidence should be reviewed by a trained forensic examiner,” without defining what constitutes either forensic evidence or a trained forensic examiner).

<sup>65</sup> NCHERM recently grossed \$425,000 from a seminar it ran to train colleges on the role of a Title IX coordinator. Sandy Hingston, *The New Rules of College Sex*, PHILADELPHIA MAG. (Sept. 2011), [http://www.phillymag.com/articles/the\\_new\\_rules\\_of\\_college\\_sex/](http://www.phillymag.com/articles/the_new_rules_of_college_sex/); see also Sarah Lipka, *The Fearmonger*, CHRONICLE OF HIGHER EDUC. (Nov. 20, 2011), <http://chronicle.com/article/The-Fearmonger/129833>. For a list of all organizations that have employed NCHERM, see *Our Clients*, NAT’L CTR. FOR HIGHER EDUC. RISK MGMT., <http://ncher.org/about/ncher-client-list/>.

publically stated he looks forward to seeing more accused students expelled.<sup>66</sup> Universities, acting on NCHERM's advice, have changed their definitions of "sexual assault" to require a showing of affirmative consent for acquittal, which sounds perilously close to requiring an accused to prove his or her innocence as an affirmative defense.<sup>67</sup> NCHERM also urges schools to redefine sexual misconduct to criminalize voluntary sex resulting from "unreasonable pressure;" these opaquely worded guidelines thus turn many consensual encounters into potential violations.<sup>68</sup> The Letter does not condemn these practices.

Defenders of the Letter would likely argue that developments such as a complainant right of appeal or a lower burden of proof simply create an "equitable" process; although they may appear to be victim-centered, these commentators would argue, that it is only because campus judicial processes have usually focused exclusively on accused student rights.<sup>69</sup> Critics of the author's views might also argue that to insist on higher burdens of proof is to return to the dark days of presuming that all complainants are dishonest.<sup>70</sup> It would be highly unlikely for defenders to adopt OCR's stated justifications for the lower burden, as even former OCR attorneys have noted that they make little sense.<sup>71</sup>

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<sup>66</sup> Hingston, *supra* note 65.

<sup>67</sup> See Kristin Jones, *An Uncommon Outcome at Holy Cross*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/24/4373/uncommon-outcome-holy-cross-0> ("[Sokolow] recommends that schools frame sexual assault as an offense without consent, rather than an offense against the will of the victim. The difference, he says, shifts the responsibility from the victim having to prove refusal to consent, and requires the initiator of the sexual activity to demonstrate that consent was given.").

<sup>68</sup> BRETT A. SOKOLOW, NCHERM MODEL SEXUAL MISCONDUCT POLICY 9 (2010), *available at* <http://www.ncher.org/documents/MODELSEXUALMISCONDUCTPOLICY1-10.pdf>. The following example appears at 9: "Amanda and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Amanda to come up to his room. From 11:00pm until 3:00am, Bill uses every line he can think of to convince Amanda to have sex with him, but she adamantly refuses. He keeps at her, and begins to question her religious convictions, and accuses her of being 'a prude.' Finally, it seems to Bill that her resolve is weakening, and he convinces her to give him a 'hand job' (hand to genital contact). Amanda would never had [sic] done it but for Bill's incessant advances . . . Bill is responsible for violating the university Non-Consensual Sexual Contact policy. It is likely that a university hearing board would find that the degree and duration of the pressure Bill applied to Amanda are unreasonable. Bill coerced Amanda into performing unwanted sexual touching upon him. Where sexual activity is coerced, it is forced. Consent is not effective when forced. Sex without effective consent is sexual misconduct." (emphasis in original).

<sup>69</sup> See W. SCOTT LEWIS, SAUNDRA K. SCHUSTER, AND BRETT A. SOKOLOW, DELIBERATELY INDIFFERENT: CRAFTING EQUITABLE AND EFFECTIVE REMEDIAL PROCESSES TO ADDRESS CAMPUS SEXUAL VIOLENCE 4 (2011), *available at* <http://ncher.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf>. As explained *infra* Part III(B), the suggestion that there are even minimally effective safeguards to protect accused students in disciplinary proceedings is preposterous.

<sup>70</sup> See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 953, 1052 (2004) (arguing that colleges should employ a preponderance standard as a way of rejecting the legacy of the corroboration requirement from criminal law in campus disciplinary proceedings).

<sup>71</sup> Hans Bader (former OCR Civil Rights Attorney), *Education Department Changes Burden of Proof in Sexual Harassment Cases Under Title IX*, OPENMARKET.ORG (Apr. 11, 2011), <http://www.openmarket.org/2011/04/11/education-department-changes-burden-of-proof-in-sexual-harassment-cases-under-title-ix/> ("It is completely true, and completely irrelevant, that the preponderance of the evidence standard applies in lawsuits in general, as well as civil-rights cases. But that burden of proof applies to whether the school violated Title IX by behaving inappropriately, not whether students or staff engaged in harassment . . . Since an institution itself must behave in a culpable fashion, not just the harasser, federal courts have held that there is no violation of the civil rights laws even if harassment occurs, as long as the institution investigates in good faith in response to the allegation of harassment. That's true even if the institution ultimately refuses to discipline a harasser

The first response to these disagreements is that they should have been discussed before the Letter's issuance. OCR's Letter, which purports to not add new requirements to existing law but does so in reality, should have gone through notice-and-comment rulemaking to give everyone a chance to be heard and to give these important issues thorough consideration. A second response is that the Letter by its own admission does not seek equal rights for both the accused and the complainant, but rather superior rights for complainants. Only complainants are entitled to have a school inform them of their rights and, even in the realm of appeals (which are theoretically supposed to be "equal" under the Letter) only complainants can ask the Title IX coordinator to review a sanction against the accused to see if another remedy should have been provided. An accused student has no right of review to the Title IX coordinator in any circumstance. Third, there is nothing about insisting on more proof that is tantamount to calling complainants liars. Instead, a higher burden reflects the necessity of certainty before convicting an accused student of the highly stigmatizing offense of sexual assault:

[M]indful that the function of legal process is to minimize the risk of erroneous decisions, the [Supreme] Court has noted that an intermediate standard of proof (*e.g.*, the "clear and convincing" standard) may be employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant, because the interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.<sup>72</sup>

A higher burden of proof is also especially appropriate in academic settings because college officials do not have the same degree of professional competence as do trained judges and police officers. Also, the evidence of what happened in a typical sexual assault case is usually murky and prone to an increased risk of erroneous conviction. Finally, even OCR has previously explained why complainants should not have appeal rights: it approved of a school's limiting appeal rights to the accused because "he/she is the one who stands to be tried twice for the same allegation."<sup>73</sup>

#### **D. OCR Administrative Enforcement Opinions**

This section of the paper explores Title IX policy as reflected in OCR administrative enforcement opinions,<sup>74</sup> which although publicly available must be obtained through a lengthy and cumbersome process of filing a Freedom of Information Act (FOIA) request. While OCR's letters are not binding judicial precedents,<sup>75</sup> the office has cited them in support of policies announced in

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based on the reasonable belief that he is innocent, after applying a firm presumption of innocence.") (emphasis in original).

<sup>72</sup> Letter from Will Creeley, *supra* note 6 (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

<sup>73</sup> Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).

<sup>74</sup> Most letters reviewed for this section predate OCR's April 4, 2011 Letter.

<sup>75</sup> "Dear Colleague" Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Department of Education (Jan. 25, 2006), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> ("OCR resolution letters . . . are fact-specific statements of the investigative findings and dispositions in individual cases and are not formal statements of OCR policy.")

its Guidances<sup>76</sup> and, as detailed *supra*, some contradict recent OCR assertions about what Title IX requires of sexual assault investigations.

A note on the difficulty of researching and writing this section is in order. The material cited herein came from FOIA requests with the twelve regional OCR offices that process Title IX complaints and OCR's national headquarters in Washington, D.C. The offices are not consistent in how they code, classify, and retrieve information, and some do not follow their own self-imposed systems.<sup>77</sup> Thus, many offices produced irrelevant and/or non-responsive material. Two FOIA requests seeking the same information from the same office can further result in the production of different documents,<sup>78</sup> and OCR's FOIA officers may issue contradictory advice and instructions regarding the regulations that govern the Department's responsibilities.<sup>79</sup> OCR also destroys its case files roughly fifteen years after monitoring the final Title IX settlement, meaning some cases are lost forever. While the author tried to review every Title IX enforcement letter ever issued concerning sexual violence at colleges and universities, the difficulties of obtaining the material mean that this section is likely incomplete.

OCR's enforcement is best described as inconsistent. OCR has held, for example, that giving an accused student access to the complainant's statement before requiring a response to the charges is, and is not, a Title IX violation,<sup>80</sup> that a complainant does and does not have any obligation to prove that s/he has been sexually harassed;<sup>81</sup> and that a university does and does not violate Title IX by providing the accused with an opportunity to appeal an adverse decision

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<sup>76</sup> See 2001 GUIDANCE, *supra* note 14, at 24-39; 1997 Guidance, *supra* note 31, at 12046-51.

<sup>77</sup> While OCR Atlanta has codes that include "sexual harassment" and "sexual violence," the case of Erskine College, OCR Complaint No. 04-04-2016 (date not given), was miscoded as "different treatment/denial of benefits" even though it involved sexual assault. In addition, OCR San Francisco chose to redact a paragraph of its opinion in Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994), on grounds of "unwarranted invasion of personal privacy" while a different OCR office provided the Sonoma opinion in full.

<sup>78</sup> The author filed a request with OCR Boston in April 2011 seeking "all OCR documents, including settlement agreements and letters of explanation/closure, pertaining to Title IX complaints of sexual harassment and sexual violence (rape, sexual assault, etc), filed by college/university students within your region," as limited to peer-to-peer harassment complaints. The materials produced in response omitted the student-to-student sexual assault case of Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006), which was produced in response to a request by another requester on file with the author from October 2010 seeking "decisions from the Office of Civil Rights addressing Title IX complaints regarding sexual harassment and sexual violence filed by College and University students." As one other commentator recently noted, "it appears that the DOE is engaging in a systemic FOIA violation." Cantalupo, *supra* note 16, at 236-42.

<sup>79</sup> For example, in denying the author's initial request for a fee waiver, OCR New York informed him that he should appeal pursuant to 34 C.F.R. § 5.64(b). The author discovered, however, that the cited provision had been repealed over a year and a half earlier. See Availability of Information to the Public, 75 Fed. Reg. 33509 (June 14, 2010). OCR Philadelphia also purported to charge the author a \$3.00 processing fee, yet OCR's national headquarters mailed the author's check back uncashed with a note stating that the minimum fee that can be assessed is \$5.00.

<sup>80</sup> Compare Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008) (giving the accused access to the complainant's statement before requiring him to respond to sexual assault allegations *does not* violate Title IX) with Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994) (giving the accused access to the complainant's allegations before requiring him to respond *does* violate Title IX).

<sup>81</sup> Compare Erskine College, OCR Complaint No. 04-04-2016 (date not given) (finding a Title IX violation when the school "required the complainant to prove that she had been sexually harassed rather than requiring the college to fully investigate the charge and issue findings and a report") with Central Washington University, OCR Complaint No. 10-94-2068 (Dec. 28, 1994) (stating that a school did *not* violate Title IX even though under its procedures, "the complainant is responsible for presenting the evidence to support his/her claim of discrimination").

without notifying the complainant that the appeal will take place.<sup>82</sup> OCR also is and is not concerned when one party to a sexual assault allegation receives more information about how the grievance process works than the other, depending on whether the disadvantaged student is the complainant or the accused.<sup>83</sup> It is especially puzzling that the letters in two of those four sets of contradictory opinions were issued in the same year as each other.

Surprisingly, many OCR enforcement letters also challenge popular assumptions about best practices for sexual misconduct resolution. For example, despite the widespread belief that victims must be afforded amnesty for underage drinking in order to come forward, OCR has allowed schools to punish complainants for alcohol and/or drug use that occurred during their alleged assaults.<sup>84</sup> OCR has also said that a nine-month delay between filing charges and resolution satisfies Title IX's requirement that grievance procedures be "prompt."<sup>85</sup> Nor do accused students have to be suspended or expelled from an institution when found guilty in order for their schools to be Title IX compliant.<sup>86</sup>

In general, accused students do not file Title IX grievances. There is only one case, Bates College, which concerns a Title IX administrative complaint alleging wrongful discipline for sexual misconduct.<sup>87</sup> The opinion noted that the complainant was allowed to revise her statement

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<sup>82</sup> Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) ("[W]e further find that the University's policy of not providing notice that an appeal may take place is not equitable.") with Duke University, OCR Complaint No. 11-07-2024 (June 29, 2007) ("Because [the two] appeals were decided on procedural grounds, OCR is unable to conclude that there was a violation of Title IX" for failing to inform the complainant that they would occur).

<sup>83</sup> Compare Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007) ("We also find that the pre-hearing procedures are not equitable because the student charged is given a great deal more information than the victim, including a pre-hearing meeting where the student charged is given an opportunity to present his/her side of the story and discuss the hearing procedures, notified of his/her right to a representative or counsel, provided copies of the Code of Conduct, hearing procedures, and a summary of the evidence.") with Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding no Title IX violation even though the college supplied the complainant with a special advocate who showed the complainant a video about how the disciplinary process works, answered the complainant's questions, and served as the complainant's advocate during the hearing while the complainant participated via conference call, while refusing to supply the accused with a similar advocate).

<sup>84</sup> Wenatchee Valley College at Omak, OCR Complaint No. 10-05-2010 (June 24, 2005) (drinking); Boston University, OCR Complaint No. 01-02-2037 (Apr. 25, 2003) (marijuana); Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003) (drinking).

<sup>85</sup> University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008); University of Vermont, OCR Complaint No. 01-95-2022 (Mar. 27, 1995).

<sup>86</sup> Massachusetts College of Art and Design, OCR Complaint No. 01-10-2046 (Oct. 8, 2010) (approving a sentence of disciplinary probation, a no-contact order, educational counseling, and an educational workshop in a case of sexual assault, noting that "the sanctions that the College did impose appeared reasonably calculated to prevent further harassing conduct by the Student"); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (approving of a written reprimand and a letter of apology in a sexual assault case); University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (holding in a case of rape that "there is no indication that the sanctions were not reasonably calculated to end the harassment and prevent it from recurring," where the sanctions were a two-quarter suspension (including one summer quarter), one year of academic probation, a requirement that the accused write a paper and a book report about sexual harassment, suspension from residence until the papers were completed, and prohibition from further contact with the complainant); Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996) (approving a sentence of one year of social probation). Skidmore even suggests that asking OCR to review a penalty is *per se* inappropriate. *Id.* ("In determining whether a violation of Title IX exists, OCR examines whether the institution in question has taken appropriate action in response to the alleged violation; it does not review the sufficiency of any findings made, or any penalties imposed.") (emphasis added).

<sup>87</sup> Bates College, OCR Complaint No. 01-00-2085 (Oct. 19, 2001).



midway through the hearing, the only transcript of the proceedings was an incomplete handwritten note, the Dean of Students served as both investigator and counselor to the complainant, the complainant's therapist was added as a witness on the morning of the hearing, and those determining the accused's sentence considered allegations for which he had never been sanctioned or found guilty. OCR's investigation also discovered that the college was violating the terms of a court order that required the university to amend its procedures to protect accused student rights. Yet unlike in letters analyzing complainant claims, which focus merely on whether hearings are "equitable" and find Title IX violations when they are not, Bates College applied a "different treatment" analysis. It required the accused, in essence, to prove that a female accused student would not have been treated as unfairly as he was. Unsurprisingly, the opinion concluded that there was insufficient evidence of a Title IX violation.<sup>88</sup>

As for how OCR resolutions of complainant grievances treat accused students, not all of them are actively hostile to accused student rights.<sup>89</sup> OCR letters have held that a school has no Title IX obligation to investigate harassment charges after a complainant or the accused graduates.<sup>90</sup> Nor does a college have to hold a formal hearing if after an investigation it concludes that a sexual assault charge is unsubstantiated.<sup>91</sup> Prior OCR letters have also ruled that a school's failure to engage "emergency discipline" features in sexual assault cases, such as temporarily suspending accused students, is not a Title IX violation.<sup>92</sup> Finally, at least one OCR opinion approved a process whereby an accused student brought disciplinary counterclaims against a complainant.<sup>93</sup>

Some letters, however, are blatantly against the accused in their tone and holdings. Sonoma State University,<sup>94</sup> a case that many commentators cite in discussing Title IX policy,<sup>95</sup> is particularly noteworthy for three reasons. First, despite the fact that OCR did not recognize student-to-student sexual harassment as a form of conduct that Title IX prohibits until 1997,<sup>96</sup> the OCR investigator who handled the case in 1994 unilaterally declared that allegations of student-to-

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<sup>88</sup> Courts apply the same double standard to Title IX's private right of action. *See infra* Part III(A).

<sup>89</sup> One letter said, "Title IX does not prohibit the use of due process," Harvard University, OCR Complaint No. 01-02-2041 (Apr. 1, 2003). *Accord*, Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) ("OCR recognizes (and does not question) that the University chose to employ its Disciplinary Process in this case in order to afford [the accused] his due process rights before taking potential disciplinary action against him."). While these statements about due process are tautological as applied to public schools, it is significant that OCR said them while investigating private universities.

<sup>90</sup> Texas Women's University, OCR Complaint No. 06-95-2023 (Mar. 8, 1995) ("Prior to the initiation of an investigation of the complaint allegations, OCR determined that the allegations, whether true or not, are now moot due to the fact that the complainant has completed her studies at TWU. In consideration of the fact that, since the complainant's graduation, no personal remedy remains and no class or systemic violations are alleged, we will pursue this matter no further."); University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008) (approving of the fact that "[t]he University took no action against Student C because he had graduated and it had no jurisdiction over him"). *See also* University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994), and attached Voluntary Resolution Plan (requiring a school to reopen an investigation of a student who voluntarily withdrew *should he be readmitted*, implying that voluntarily withdrawal precludes such investigations).

<sup>91</sup> Bates College, OCR Complaint No. 01-04-2051 (Feb. 3, 2005).

<sup>92</sup> University of Wisconsin-Madison, OCR Complaint No. 05-07-2074 (Aug. 6, 2008).

<sup>93</sup> Boston University, OCR Complaint No. 01-02-2006 (Apr. 25, 2003).

<sup>94</sup> Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994).

<sup>95</sup> *See, e.g.,* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 287 (2009).

<sup>96</sup> *See* Part II(B) *supra*.

student sexual violence were within OCR's jurisdiction.<sup>97</sup> Second, Sonoma employed a bizarre definition of the phrase "hostile environment," stating that sanctions which deter future harassment are sufficient to "cleanse" a hostile environment in a given case while also opining that harassment that occurs in private between two people can "poison" an entire educational atmosphere.<sup>98</sup> Third – and in contrast to both civil and criminal court systems, where a defendant must always be served with a complaint or an indictment before being required to respond – Sonoma declared that telling the accused what he or she is accused of, even seconds before demanding the accused explain him/herself without the benefit of counsel, violates Title IX.<sup>99</sup> As Sonoma illustrates, specific OCR enforcement officers may have agendas beyond OCR's top-down guidance materials and there are no clear checks and balances on any one officer to prevent him or her from having his or her way in a given case.

Even worse, in some instances OCR has enticed schools to secretly agree to reinvestigate a student who was previously acquitted of wrongdoing. Recently, and in seeming disregard of the fact that "OCR does not serve as an appellate authority that reviews the merits of individual decisions by universities under their grievance procedures,"<sup>100</sup> OCR and colleges have started to sign contracts in which OCR drops Title IX charges against the institution on the condition that the school secretly agree to reinvestigate a sexual harassment allegation, with no notice to the accused until the second investigation begins.<sup>101</sup> The school, in essence, signs away the student's rights to protect itself; because a Title IX administrative complaint is strictly between the government and the college, an accused student is usually not made a party to it or even given notice that it is

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<sup>97</sup> Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994). All of OCR San Francisco appears to have acted similarly, as numerous other opinions predating the 1997 Guidance applied a similar definition either explicitly or by investigating allegations of student-to-student harassment. See Humboldt State University, OCR Complaint No. 09-94-2105 (Oct. 3, 1994); University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994); Foothill College, OCR Complaint No. 09-94-2021 (June 10, 1994); Occidental College, OCR Complaint No. 09-93-2100 (May 2, 1994); California State Polytechnic University-Pomona, OCR Complaint No. 09-92-2127-I (Dec. 28, 1992). See also *Doe by & Through Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995) (holding that no duty to respond to peer-to-peer harassment existed at this time).

<sup>98</sup> Sonoma State University, OCR Complaint No. 09-93-2131 (Apr. 29, 1994) ("A hostile environment not only affects the direct victims of the sexual harassment, but poisons the educational environment for all students and staff. Appropriate sanctions must be designed to persuade potential harassers to refrain from unlawful conduct and thus, [sic] cleanse the hostile environment.").

<sup>99</sup> *Id.* ("OCR found that specific factual assertions from [the complainant's statements] were read to the accused, Student 1, at the initial meeting concerning the complaints. In other words, prior to being questioned regarding the allegations, Student 1 was permitted to rebut specifics from the complainants' allegations. The complainants were never afforded a similar opportunity for rebuttal. SSU thereby precluded the possibility of conducting an impartial inquiry designed to determine the veracity of the allegations and credibility of witnesses . . . OCR found that from that point when Student 1 was permitted access to the complainants' specific factual allegations the investigation into the complaints was tainted because SSU could not complete a thorough and objective investigation without asking independent and objective questions. Student 1's answers were preordained by SSU's questions. Any possibility of making a determination of the credibility of the witnesses and veracity of their testimony was irreparably harmed at the outset.") (emphasis added). For a case in which OCR contradicted its own rule, see Bethany Lutheran College, OCR Complaint No. 05-08-2043 (June 23, 2008).

<sup>100</sup> University of New England, OCR Complaint No. 01-04-2038 (Sept. 30, 2005).

<sup>101</sup> Alderson-Broadbuss College, OCR Complaint No. 03-11-2015 (May 6, 2011); Rider University, OCR Complaint No. 02-09-2101 (Apr. 8, 2010); Southern Illinois University-Carbondale, OCR Complaint No. 05-09-2133 (Nov. 18, 2009); University of Maryland-Baltimore, OCR Complaint No. 03-07-2121 (July 16, 2008); Temple University, OCR Complaint No. 03-06-2060 (June 4, 2007); Illinois College, OCR Complaint No. 05-06-2154 (Dec. 18, 2006).

happening.<sup>102</sup> In these cases, a conviction upon subsequent investigation is all but assured. No risk-averse institution would dare defy OCR's unstated command to convict on the second try. OCR's practice contradicts both intrinsic notions of fundamental fairness to the accused and even prior OCR opinions about the scope of both a college's and the agency's own authority,<sup>103</sup> but no one has yet been able to mount a legal challenge (perhaps because the agency's covert method of operation has eluded detection).

In summary, OCR's administrative enforcement scheme is increasingly skewed toward complainants at the expense of accused student rights. In this regard, individual enforcement letters may go even further than formal policy guidances.

### III. Private Rights of Action

The administrative enforcement scheme outlined in Part II would be more than enough on its own to put all accused students at risk of conviction regardless of guilt or innocence. Campus sexual assault trials are additionally stacked against the defendant, however, because complainants have vastly superior private rights of action in court against their educational institutions.

#### A. Different Rights Under Title IX for Complainants and Accused Students

Title IX, which prohibits colleges from engaging in sex discrimination, is enforceable through a private right of action in federal court.<sup>104</sup> In 1992, the Supreme Court interpreted the statute as allowing suits for money damages in response to a school employee's sexual harassment of a student.<sup>105</sup> Questions then arose about student-to-student harassment. Could Title IX make a school liable for failing to respond to sexual violence between its students, as Title VII makes employers liable for failing to prevent or remedy hostile environment sexual harassment between coworkers?

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<sup>102</sup> In Southern Illinois University-Carbondale, for example, OCR's letter specifically states that "OCR conducted interviews with the Complainant and eight university employees" but not the accused despite the fact that OCR's disposition of the case required that the accused be reinvestigated. OCR Complaint No. 05-09-2133 (Nov. 18, 2009).

<sup>103</sup> In University of California-Santa Cruz, OCR Complaint No. 09-93-2141 (June 15, 1994), OCR sought increased sanctions against two students who were found to have committed rape. However, the college and the students had signed settlement contracts. OCR concluded that the college could not breach its contract with its students, stating "[a]fter extensive discussions, OCR and UCSC *did not find sound legal authority which would allow UCSC to breach the agreements, which were contracts between UCSC and the students.* While OCR finds deplorable the terms and results of the agreements reached between UCSC and Students A and D, no further action is available to OCR." (emphasis added). Because a student and a college have a contractual relationship as explained *infra* Part III(B), OCR's practice violates Santa Cruz's principle that a school cannot breach an agreement with its students: the outcome of a disciplinary process, when the school's procedures are followed, must necessarily become part of that same contractual relationship such that a school cannot retry an accused student for the same offense.

<sup>104</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979). It is not clear that the creation of a judicial right of action would be the result if *Cannon* were retried today, however. See Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and Realism*, 90 MICH. L. REV. 1062, 1076 (1992) ("Justice Powell's reluctance to enforce congressional purposes became more influential, and the Court further restricted implied rights of action in subsequent cases."). It is also important to remember that Title IX's private right of action only authorizes suits against institutional recipients of federal funds, not individual students. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009).

<sup>105</sup> *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

Until 1999, the answer to that question in one federal circuit was no. In *Rowinsky v. Bryan Independent School District*, the Fifth Circuit held that complainants do not have any such private right of action because “[t]he mere existence of sexual harassment does not necessarily constitute sexual discrimination” by the institution.<sup>106</sup> Instead, *Rowinsky* held that “a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate title IX [sic] if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys.”<sup>107</sup> *Rowinsky*’s standard forces complainants to analyze every disciplinary case a school has ever adjudicated in order to prove that their result was symptomatic of a broader pattern of gender bias. Because a school that is equally indifferent to the rights of male and female complainants cannot be said to be violating Title IX under *Rowinsky*’s reasoning, the case provides no meaningful theory of relief for complainants in the face of university indifference to sexual assault.

In 1999, however, the Supreme Court issued its opinion in *Davis v. Monroe County Board of Education*.<sup>108</sup> *Davis* established that complainants have a private right of action for money damages under Title IX when a school “acts with deliberate indifference to known acts of harassment in its programs or activities.”<sup>109</sup> The Court also specified that student-to-student sexual harassment is actionable under Title IX “only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>110</sup> While *Davis* dealt with harassment of elementary school students, the dissent noted that “the majority’s holding would appear to apply with equal force to universities, which do not exercise custodial and tutelary power over their adult students.”<sup>111</sup>

One conclusion of law that all nine justices in *Davis* agreed upon was that a single incident of alleged student-to-student sexual harassment, including rape or sexual assault, generally cannot support a Title IX claim for money damages.<sup>112</sup> While several courts have been faithful to *Davis*

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<sup>106</sup> *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996).

<sup>107</sup> *Id.* *Rowinsky* was one of several conflicting appellate interpretations of Title IX’s private right of action that existed before *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). See *Davis v. Monroe Cnty. Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997); *Doe v. Univ. of Ill.*, 138 F.3d 653, 660-68 (7th Cir. 1998); *Brzonkala v. Va. Polytechnic Inst. and State Univ.*, 132 F.3d 949, 960-61 (4th Cir. 1997) *vacated and District Court decision aff’d en banc*, 169 F.3d 820 (4th Cir. 1999); *Oona, R.S. v. McCaffrey*, 143 F.3d 473, 476-78 (9th Cir. 1998).

<sup>108</sup> 526 U.S. 629 (1999).

<sup>109</sup> *Id.* at 633.

<sup>110</sup> *Id.* at 652.

<sup>111</sup> *Id.* at 667 (Kennedy, J., dissenting).

<sup>112</sup> See *id.* at 652-53 (“[T]he [Title IX] provision that the discrimination occur ‘under any education program or activity’ suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. *Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level* in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”) (emphasis added); see also *id.* at 677 (Kennedy, J., dissenting) (“The majority’s reference to a ‘systemic effect’ does nothing to clarify the content of its standard. *The majority appears to intend that requirement to do no more than exclude the possibility that a single act of harassment perpetrated by one student on one other student can form the basis for an actionable claim.* That is a small concession indeed.”) (emphasis added). In revising its 1997 Guidance, OCR refused to comply with this aspect of *Davis*’s holding even while claiming that the 2001 Guidance is consistent with *Davis*. See 2001 GUIDANCE, *supra* note 14, at v-vi, 6.

in holding that a single allegation of sexual assault on a college campus is not actionable,<sup>113</sup> many others have disregarded the Supreme Court's caveat in cases of university students and sexual violence.<sup>114</sup> In so holding, the latter group has essentially turned Title IX into the law held unconstitutional by *United States v. Morrison*.<sup>115</sup> *Morrison* struck down the portions of the Violence Against Women Act that provided a direct civil remedy for complainants to sue accused perpetrators in federal court for crimes motivated by gender. Because giving complainants a direct federal remedy against accused students for sexual assault is unconstitutional, Title IX instead now provides an indirect remedy by giving complainants recourse against their institutions (and by extension, giving complainants a method of incentivizing their schools to punish those accused of sexual violence as a means of preventing costly law suits).

In recent years, Title IX claims have led to high-profile monetary settlements for complainants. To give just three examples, *Simpson v. University of Colorado* settled for \$2.85 million, *J.K. v. Arizona Board of Regents* settled for \$850,000, and *Williams v. University of Georgia* settled for an undisclosed six-figure sum.<sup>116</sup> Although one commentator has expressed caution that these cases may be limited to the extremity of their facts,<sup>117</sup> they stand for the general proposition that the failure to conform to Title IX can lead to financially disastrous consequences for an educational institution. That knowledge hangs like a Sword of Damocles over risk-averse administrators as they adjudicate campus sexual assault allegations.

It might sound intuitive that any aspect of a sexual assault proceeding implicates concerns of gender parity and that sexual violence is so intertwined with the prospect of discrimination based on sex that *Davis*'s holding should extend to accused students as well. It could be argued that a school's reacting to an accused student's innocence with deliberate indifference, much like a school's reacting with indifference to a complainant's suffering, should implicate Title IX's concerns given the sexualized context. Were Title IX so interpreted, both complainants and accused students would have equivalent rights under the statute. If seriously mistreated, each would have a claim against their school and the law would recognize that both wrongful acquittals and wrongful convictions are *per se* indicative of sex discrimination. Universities, in turn, would have equivalent liability concerns from both the accused and the complainant, and would thus be motivated to treat them equally.

Sadly, the law does not work that way. While a school's deliberate indifference to a sexual harassment grievance is now automatically sex discrimination, and thus actionable under Title IX, a school's deliberate indifference to an accused student's innocence is not. As a paradoxical consequence, accused student "rights" under Title IX resemble *Rowinsky*'s impossible-to-meet threshold: a plaintiff must prove that the school made its wrongful accusation as part of a broader

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<sup>113</sup> See *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1358 (M.D. Ga. 2007); *Allen v. Univ. of Vt.*, 973 A.2d 1183, 1188 (Vt. 2009) (interpreting the Vermont state equivalent of Title IX, which is identical in wording to the *Davis* standard).

<sup>114</sup> See *Jennings v. Univ. of N.C.*, 444 F.3d 255, 274 n.12; *Albiez v. Kaminski*, No. 09-CV-1127, 2010 WL 2465502, at \*16 (E.D. Wis. June 14, 2010); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at \*9 (D. Conn. Mar. 26, 2003); *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. Ct. App. 2008). A similar split exists in cases involving students under the age of 18, with decidedly more authority on the side that one incident is sufficiently severe. Compare April 4, 2011 Letter, *supra* note 3, at 3 n.10 (collecting cases holding one incident sufficient) with *Hawkins v. Sarasota Cnty. Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (one incident insufficient).

<sup>115</sup> 529 U.S. 598 (2000).

<sup>116</sup> Walker, *supra* note 28, at 124 n.185, 126, and 101, respectively.

<sup>117</sup> See *id.* at 128-30.

pattern of systematic bias.<sup>118</sup> As first established in *Yusuf v. Vassar College*, an accused student bringing a Title IX claim must allege two elements to survive a motion to dismiss: (1) his or her discipline was erroneous, and (2) “particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding.”<sup>119</sup>

Several courts have granted motions to dismiss in accused-student Title IX suits because the plaintiff failed to meet the *Yusuf* standard.<sup>120</sup> Even if the student’s case survives long enough to obtain discovery access to old university disciplinary files, a school that treats male and female accused students equally poorly will get off scot-free. The only reported case since *Yusuf* to not automatically dismiss an accused’s Title IX claim is *Vaughan v. Vermont Law School*, in which the court granted an accused student’s motion to amend his complaint to bring one.<sup>121</sup> The plaintiff in *Vaughan* alleged that his school barred him from attending the same classes as the complainant, prevented him from accessing his transcript for possible transfer, and demonstrated “disparate treatment . . . based on gender” when it accepted the complaint against him “without any investigation” but refused to investigate a complaint he made alleging assault against him by a female student.<sup>122</sup>

In summary, Title IX’s courtroom playing field is imbalanced. Accused students do not have a meaningful private right of action, while complainants have secured at least three six-figure settlements in the last five years.

## **B. Private Rights of Action for the Accused Outside of Title IX**

It has been argued that accused students have guarantees outside of Title IX that ensure sexual assault hearings are fair.<sup>123</sup> Simply put, however, accused students do not have rights that

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<sup>118</sup> Cf. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996).

<sup>119</sup> *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). Vassar College’s Assistant Dean of Student Life once declared of the falsely accused, “They have a lot of pain, but it is not a pain that I would necessarily have spared them. I think it ideally initiates a process of self-exploration. ‘How do I see women?’ ‘If I didn’t violate her, could I have?’ ‘Do I have the potential to do to her what they say I did?’ Those are good questions.” Nancy Gibbs, *When Is It Rape?*, TIME MAG. (June 24, 2001), <http://www.time.com/time/magazine/article/0,9171,157165,00.html#ixzz1QyYlxYPD>.

<sup>120</sup> See, e.g., *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996) (“[The plaintiff’s] allegations at best reflect a bias against people accused of sexual harassment and in favor of victims and indicate nothing about gender discrimination.”). See also *Mallory v. Ohio Univ.*, 76 F. App’x 634, 640 (6th Cir. 2003); *Order Under Seal at 6-8, Doe v. Univ. of Mont.*, Case 9:12-cv-00077-DLC (D. Mont. May 10, 2012), available at [http://missoulia.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf\\_683eaa12-c0c6-11e1-8193-001a4bcf887a.html](http://missoulia.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf_683eaa12-c0c6-11e1-8193-001a4bcf887a.html) (page 190-192 of 281); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744, 756 (E.D. Tenn. 2009); *Torrespico v. Columbia Coll.*, No. 97 C 8881, 1998 U.S. Dist. LEXIS 15714, at \*54 (N.D. Ill. Sept. 29, 1998). Although one sexual harassment case involving a professor held that Title IX’s implementing regulations require procedural fairness to the accused, another case reached a contrary holding and the issue has not received significant citation thereafter. Compare *Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 797 (N.Y. Sup. Ct. 1994) with *Cooper v. Gustavus Adolphus Coll.*, 957 F. Supp. 191, 193-94 (D. Minn. 1997).

<sup>121</sup> See *Vaughan v. Vt. Law Sch., Inc.*, 2:10-CV-276, 2011 U.S. Dist. LEXIS 86429, at \*10-17 (D. Vt. Aug. 4, 2011) *reconsideration denied*, 2:10-CV-276, 2011 U.S. Dist. LEXIS 102966 (D. Vt. Sept. 12, 2011).

<sup>122</sup> See *id.*

<sup>123</sup> See Hogan, *supra* note 95. Hogan’s article does not support its own thesis. While note 2 claims that her analysis applies to private colleges “as a practical matter” “because private higher education institutions often model their disciplinary proceedings on due process requirements,” she freely concedes that “private colleges generally are not state actors for purposes of due process” and thus have no obligation to do so (whereas almost every college nationwide must comply with Title IX). She also alleges that Title IX, but not due process, requires impartiality in

could serve as a counterweight to Title IX's incentives. This section explores the three most common theories upon which a student could sue his or her college for erroneous discipline, explaining why none of them provide adequate protection.<sup>124</sup>

First, public universities must respect the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in disciplining students.<sup>125</sup> The Clause, however, only confers two rights: the right to "some kind of notice" of the charges and the right to be "afforded some kind of hearing," as the Supreme Court said in *Goss v. Lopez*.<sup>126</sup> Judges usually uphold policies "consistent with the bare-minimum requirements of due process," sometimes while even labeling them "less-than-desirable for an institution of higher learning."<sup>127</sup> For universities, "the direction almost entirely is, 'How can we whittle down our due process procedures? What is the bare minimum that we have to do?'"<sup>128</sup> In essence, "[t]he procedural game too many universities in this country play is to give students enough process to fulfill the vague dictates of *Goss*, but not enough for the student to have a fair opportunity to defend himself - not enough to keep the university, and its officials, from having their way with him."<sup>129</sup>

Second, students at private colleges have a judicially created right to "fundamentally fair" discipline.<sup>130</sup> However, during his research the author was unable to find a single case of an accused student successfully pursuing a "fundamental fairness" claim. Judges have even upheld a student's sentence while at the same time calling the procedures that led to it "fundamentally unfair."<sup>131</sup>

Finally, students at both public and private universities usually have some kind of implied state law contractual right to receive any procedural protections that a college voluntarily promises to provide in its student manual or otherwise.<sup>132</sup> One of the clearest problems with the contract theory is that if an institution follows its own rules the accused student has no recourse no matter how unjustified his or her sentence. Another problem is that artful drafting can prevent the manual from providing any substantive protection: courts in some jurisdictions have given effect to broad reservation clauses that vitiate any rights the manual might have provided.<sup>133</sup> Even if a college's

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investigating a sexual assault grievance, rendering her contention that the two doctrines provide equivalent guarantees of fairness patently untrue. *See id.* at 286-88.

<sup>124</sup> As explained *infra* Part IV, some states such as New York and Arizona provide other protections. Even their safeguards, however, do not carry severe enough consequences for violation of an accused student's rights to be on par with those that attach from the violation of a complainant's rights.

<sup>125</sup> *See, e.g.,* *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (citing *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975)).

<sup>126</sup> *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis in original).

<sup>127</sup> *See Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 632 (6th Cir. 2005).

<sup>128</sup> Sarah Lipka, *Discipline Goes on Trial at Colleges*, CHRONICLE OF HIGHER EDUC. (Mar. 27, 2009), <http://chronicle.com/article/Discipline-Goes-on-Trial-at/30030>.

<sup>129</sup> Picozzi, *supra* note 59, at 2149-50.

<sup>130</sup> *E.g.,* *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (collecting cases). A few states also apply higher standards to private colleges. *See, e.g.,* *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283, 286 (N.Y. Sup. Ct. 2004) (granting review of university discipline under New York's Article 78); CAL. EDUC. CODE § 94367 (West 2009) (extending First Amendment protection to students at private universities).

<sup>131</sup> *Wilson v. Allegheny Coll.*, A.D. No. 2003-978, 2005 Pa. Dist. & Cnty. Dec. LEXIS 485, at \*23 n.4 (Crawford Cnty. Ct. of Common Pleas Dec. 12, 2005).

<sup>132</sup> *See, e.g.,* *Harwood v. Johns Hopkins Univ.*, 747 A.2d 205, 209 (Md. Ct. Spec. App. 2000); *Marquez v. Univ. of Wash.*, 648 P.2d 94, 96 (Wash. Ct. App. 1982).

<sup>133</sup> *See Millien v. Colby Coll.*, 874 A.2d 397, 400-02 (Me. 2005). *See also* Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution*

procedures do create a contractual entitlement, courts typically construe the policies against the student in determining whether the university complied.<sup>134</sup>

Accused student suits under the Due Process Clause, fundamental fairness, contractual theories, or even simple common law negligence usually end in dismissal. To the extent that a claim succeeds, the remedy typically consists of a court ordering the college to rehear the charges with any deviations from the university's own policies remedied.<sup>135</sup> Damages, if awarded, are minimal: in September 2011, for example, a student walked away with just \$26,500 after a jury held that Sewanee: the University of the South had been negligent in unjustly convicting him of rape.<sup>136</sup> His case may be the only instance of a court awarding damages to a student convicted of sexual violence.<sup>137</sup>

To summarize, as one commentator aptly noted several years before Title IX's far-reaching implications were fully understood, "[i]f colleges and universities scrupulously follow their own procedures, they have little to worry about in terms of suits from disciplined students. They should perhaps be more concerned with federal civil suits when they receive and ignore complaints from [complainants] who were sexually assaulted."<sup>138</sup>

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*Disciplinary Legal Requirements*, 9 U. N.H. L. REV. 443, 468 (2011). *But see* *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1307 (N.Y. 1980) ("As Mr. Justice Felix Frankfurter wrote almost 40 years ago in *McNabb v United States* (318 U.S. 332, 347), 'The history of liberty has largely been the history of observance of procedural safeguards.' If that be true in the dealings of the State with citizens enmeshed with its criminal justice system it is no less true in the dealings of a college with the members of its student body. *To suggest, as does the dissent, that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words.* We do not countenance that in other relationships nor should we between student and college.") (emphasis added).

<sup>134</sup> See *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 382 (Mass. 2000) (Ireland, J., dissenting) (chastising the majority for doing so).

<sup>135</sup> See Anderson, *supra* note 70, at 1013-14 ("There are about thirty-five written decisions in state and federal courts involving students who have sued their colleges or universities as a result of being disciplined for sexual assault. Ordinarily, disciplined students are only successful when colleges or universities are found to have deviated from the procedures outlined in their own disciplinary policies. When a student wins such a lawsuit, a court then orders that the college or university grant the student a new disciplinary hearing untainted by the procedural anomaly.").

<sup>136</sup> Collin Eaton, *Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges*, CHRONICLE OF HIGHER EDUC. (Sept. 2, 2011), <http://chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884/>. The jury awarded \$50,000 but reduced the sum because it deemed the student partially responsible for the university's negligence. It bears mentioning here that although players on the Duke University lacrosse team obtained substantial settlements from the college as a result of the rush to judgment they suffered, theirs is not a case of erroneous discipline because the school never actually punished them beyond canceling their lacrosse season and shamefully failing to speak out against the media and campus firestorms they endured. See STUART TAYLOR JR. AND K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 67-71* (2007).

<sup>137</sup> As of 2010, one author noted that "[s]ignificant research on this point has discovered no cases where a court has overturned a school's decision to sanction a student for peer sexual violence and awarded the student monetary compensation." Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, NASPA JOURNAL ABOUT WOMEN IN HIGHER EDUCATION Vol. 3 no. 1 at 69 (2010), available at <http://journals.naspa.org/njawhe/vol3/iss1/4/>.

<sup>138</sup> Anderson, *supra* note 70, at 1014. See also Cantalupo, *supra* note 137, at 71 (noting that institutions "are in a much less favorable position vis-à-vis survivors suing for mishandling of their campus peer sexual violence cases" than vis-à-vis "students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution."); Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007, 1010 (2006) ("The simple truth is, there is no right of redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference."). Ms. Murphy is most notoriously known for her



## IV. Proposed Reform

There have been a variety of approaches to dealing with student misconduct in higher education settings. From the *in loco parentis* era of the early twentieth century, through the student rights revolution of the 1960s and 1970s, to Title IX's influence today, courts and the federal government have sought to find a way to balance institutional autonomy with protection for the rights of the accused. As the previous sections have illustrated, however, Title IX's current framework creates disproportionate incentives to punish innocent students in cases of sexual violence. It is time to throw in the towel on university adjudication of those claims. As the United Kingdom recognized more than fifteen years ago,<sup>139</sup> as other commentators have noted,<sup>140</sup> and as even OCR opinion letters have implied,<sup>141</sup> society should leave cases of rape and sexual assault to the civil and criminal justice systems.

Given the weakness of our current system, this proposal makes perfect sense. Consider that Tennessee has already enacted legislation which recognizes a university's limited institutional competence to handle criminal matters.<sup>142</sup> Under "Robbie's Law," a university must call in local police whenever a homicide or rape has been reported.<sup>143</sup> It is only a short step to go from Robbie's Law, which still allows campus police to take the lead on rape investigations, to a fairer, more objective policy under which universities must simply refrain from conducting a judicial process that should be handled by the civil and criminal courts. Under the new proposal, students accused of rape or sexual assault would be investigated by local police and/or be subject to civil suit by complainants directly. The university would be relieved of its current Title IX obligation to conduct its own trial.

Critics might object and suggest that college disciplinary systems can be reformed to protect the innocent. For example, states could follow the lead of jurisdictions like New York (which gives students a judicial right to challenge disciplinary convictions at both public and private universities)<sup>144</sup> or Arizona (which by statute provides for a right of appeal from hearings at

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anti-due-process quotes as a commentator during the Duke lacrosse false rape case of 2006-2007, such as "Stop with the presumption of innocence. It doesn't apply to Duke." K.C. Johnson, *The Wendy Murphy File*, DURHAM-IN-WONDERLAND (Dec. 31, 2006, 12:01 AM), <http://durhamwonderland.blogspot.com/2006/12/wendy-murphy-file.html>.

<sup>139</sup> Graham Zellick, *Letter to the Editor – Why Campus Justice is No Substitute for Criminal Prosecution*, CHRONICLE OF HIGHER EDUC. (Feb. 14, 1997), <http://chronicle.com/article/Why-Campus-Justice-Is-No/77157/> (noting that the U.K. Committee of Vice-Chancellors and Principals concluded that "it was neither safe nor prudent for universities to abrogate to themselves a role which was properly the domain of the criminal courts" in light of "principles of due process and natural justice for people who are also members of our academic communities, and a proper recognition of the limits of the powers which we have available to us").

<sup>140</sup> Azhar Majeed, *Naomi Schaefer Riley in 'Chronicle' on the Need to Allow Room for Law Enforcement to Handle Campus Crime*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Nov. 18, 2011), <http://thefire.org/article/13869.html> (quoting a blog post by Naomi Schaefer Riley from The Chronicle of Higher Education's blog, Brainstorm).

<sup>141</sup> Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005).

<sup>142</sup> See *Press Release, Robbie's Law Signed By Governor Bredesen*, ROBBIE NOTTINGHAM.COM (Apr. 26, 2004), available at <http://www.robbienottingham.com/042604.html>.

<sup>143</sup> TENN. CODE ANN. § 49-7-129 (2012).

<sup>144</sup> See, e.g., *Ebert v. Yeshiva Univ.*, 780 N.Y.S.2d 283, 286 (N.Y. Sup. Ct. 2004) (citing *Gertler v. Goodgold*, 487 N.Y.S.2d 565 (N.Y. App. Div. 1st Dep't 1985)) ("[U]niversities are not beyond judicial review. Under CPLR article 78, such institutions, even private ones, are accountable for the proper discharge of their self-imposed and statutory obligations.").

public colleges and provides for attorney's fees if the student is successful).<sup>145</sup> While expanding appeal rights or due process protections would certainly help improve the status quo, fundamental reform of the campus sexual assault adjudication system is impossible in light of the irreparable conflicts of interest inherent in university discipline outlined below. The only way to make sexual assault trials truly equitable for both parties is to take them out of university hands.

### A. Why Universities Should Not Handle Sexual Assault Claims

Assuming that university administrators had the necessary training and experience to competently adjudicate sexual assault claims – which most do not<sup>146</sup> – four interests would still seriously impede their objectivity. The most obvious is financial. As detailed *supra*, acquitting an accused student carries the threat that OCR could exercise its enforcement authority and thereby cost a college over half a billion dollars in federal funding. There could also be civil litigation from the complainant, which to date has had more high-profile impact on college campuses than comparable suits from accused students. Furthermore, in light of the NCAA's unprecedented \$60 million fine against Penn State in July 2012, there is now reason to fear that any misconduct by university athletes or athletic personnel (including a perceived failure to take strong enough action against perpetrators of sexual violence, the offense for which Penn State was fined) could expose the institution to further sanctions.<sup>147</sup> As a pure matter of risk aversion, therefore, colleges have a very strong incentive to convict accused students in all circumstances.

The second interest concerns a university official's professional career. "The primary goal of modern academic administrators is to buy peace during their tenure and to preserve the appearance of competence *on their watch* – an appearance essential to their careers."<sup>148</sup> Accordingly, "faced with a student disturbance, a university administrator may not be thinking as a teacher or even an adjudicator; [s/]he is more likely thinking in utilitarian terms about what is best for the institution at the expense of individual justice, or just as a bureaucrat protecting his[/her] job."<sup>149</sup> As with a university's financial incentives, only mistreating complainants carries consequences: while Duke's president kept his job after the campus rushed to judge its innocent lacrosse team during an infamous false rape case in 2006-2007,<sup>150</sup> and while two different presidents of Brown University have each survived high-profile law suits from accused students in

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<sup>145</sup> ARIZ. REV. STAT. ANN. §§12-910, 12-348, 41-1007 (2012).

<sup>146</sup> For arguments to that effect from a former Dean of Harvard College, see HARRY LEWIS, EXCELLENCE WITHOUT A SOUL: DOES LIBERAL EDUCATION HAVE A FUTURE? 193 (2006) (noting "the folly of academics operating in realms beyond their expertise" and further opining, "confident of the superiority of its wisdom on matters of both justice and sex, the Harvard Faculty refused to acknowledge its incompetence to be fair, wise, or even logical in coping with rape").

<sup>147</sup> Pete Thamel, *Sanctions Decimate the Nittany Lions Now and for Years to Come*, N.Y. TIMES (July 23, 2012), <http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html>.

<sup>148</sup> ALAN CHARLES KORS AND HARVEY SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* 313 (1998) (emphasis in original).

<sup>149</sup> See Picozzi, *supra* note 59, at 2144. Cf. *In re Oracle*, 824 A.2d 917, 938 (Del. Ch. 2003) ("[O]ur law also cannot assume – absent some proof of the point – that corporate directors are, as a general matter, persons of unusual social bravery, who operate heedless to the inhibitions that social norms generate for ordinary folk.").

<sup>150</sup> For more details, see generally TAYLOR JR. AND JOHNSON, *supra* note 136. See also Stuart Taylor Jr. and K.C. Johnson, Op-Ed., *Johnson and Taylor: Penn State, Duke and Integrity: Two universities, two scandals, two leadership crises. That's where the comparison ends*, WALL ST. J. (July 19, 2012), <http://online.wsj.com/article/SB10001424052702303933704577532891512167490.html>.

sexual misconduct cases over the past fifteen years,<sup>151</sup> “the president, chancellor, athletic director and football coach” of the University of Colorado were all fired after the Title IX case of *Simpson v. University of Colorado* came to light.<sup>152</sup>

A third interest concerns the university’s reputation. Because universities appeal to popular sentiment to attract students and receive alumni donations, they shun negative publicity. Their aversion to bad press has caused shameful indifference to sexual assault in the past,<sup>153</sup> most recently in Penn State’s cover-up of Jerry Sandusky’s serial child molestation. In coming years, however, as colleges find themselves increasingly accountable to “the grievances of those who might occupy buildings, disrupt the campus, and attract the media [such as] [t]he self-appointed militants who claim to speak on behalf of all . . . feminist women”<sup>154</sup> (many of whom disfavor any due process for the accused),<sup>155</sup> the interest in preventing the institution from “being branded ‘soft’ on sexual assault by victims’ rights groups and by the media” will come to dominate a university’s thinking.<sup>156</sup> As one administrator said, “my fear – yes, it’s fear – of seeing my institution’s name in *Inside Higher Ed* or *The Chronicle of Higher Education* as the subject of an investigation, or, even worse, having the ‘letter of agreement’ OCR makes public displayed for all to read – makes me tow the line in a way I sometimes have trouble justifying to myself.”<sup>157</sup> Schools responding to sexual assault will remember how Dickinson College garnered adverse media attention in March 2011 when students stormed and occupied the president’s office to demand harsher sentences for sexual misconduct.<sup>158</sup> Cases involving wrongfully accused students do not carry the same media or reputational concerns for institutions, as even the Duke lacrosse case did not have lasting

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<sup>151</sup> The most recent claim occurred in 2010, see Tom Bale, *Letter to the Editor: In Defense of U’s Handling of McCormick*, BROWN DAILY HERALD (Nov. 13, 2011), <http://www.browndailyherald.com/letter-in-defense-of-u-s-handling-of-mccormick-1.2670225#.TsG1aZzrViA>. The other occurred in 1996. See Dan Subotnik, “Hands Off”: Sex, Feminism, Affirmative Consent and the Law of Foreplay, 16 S. CAL. REV. L. & SOCIAL JUSTICE 249 (2007).

<sup>152</sup> Megan Ryan, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference Held at Harvard Law School*, 31 HARV. J.L. & GENDER 378, 385 (2008).

<sup>153</sup> See Nina Bernstein, *On College Campuses, Athletes Get Off Easy*, N.Y. TIMES (Nov. 11, 2011), <http://www.nytimes.com/2011/11/12/us/on-college-campuses-athletes-often-get-off-easy.html> (detailing how university police have suppressed crime reporting on campus to protect the institution’s reputation).

<sup>154</sup> See KORS AND SILVERGLATE, *supra* note 148, at 313-14.

<sup>155</sup> See Bale, *supra* note 151 (“The university is to be applauded for . . . [its] message to all males: ‘You need to check your behavior carefully before you enter into a relationship with a woman. *There will be no due process if you are accused of rape. The woman’s version of what happened will always be accepted over the man’s account.* If a male student knew that was the policy hopefully this would serve as a check on sexually aggressive behavior.”) (emphasis added). In the McCormick case, Brown is alleged to have forced out an innocent accused student to placate a prominent alumni donor. See K.C. Johnson, *A Black Eye for Brown In a Controversial Rape Case*, MINDINGTHECAMPUS.COM (Dec. 23, 2011), [http://www.mindingthecampus.com/forum/2011/12/a\\_black\\_eye\\_for\\_brown\\_in\\_a\\_con.html](http://www.mindingthecampus.com/forum/2011/12/a_black_eye_for_brown_in_a_con.html); *McCormick v. Dresdale*, CA. No. 09-474 S, 2010 U.S. Dist. LEXIS 53049 (D.R.I. May 28, 2010).

<sup>156</sup> Anonymous, *Essay, OCR Guidelines on Sexual Assault Hurt Colleges and Students*, INSIDE HIGHER ED. (Oct. 28, 2011), <http://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>. See also Lipka, *supra* note 128 (“[I]n cases that generate strong public pressure, especially those involving athletes and allegations of sexual assault, [p]rotestors’ calls for action – and fears of liability for inaction – can prompt institutions to swiftly discipline accused students. ‘Administrators have a strong inducement to basically punish first and ask questions later,’ says Mr. Pavela.”) (emphasis added).

<sup>157</sup> Anonymous, *supra* note 156.

<sup>158</sup> See Marylyne Pitz, *Dickinson College to Change Sexual Assault Policy After Sit-In*, PITTSBURGH POST-GAZETTE (Mar. 6, 2011), <http://www.post-gazette.com/pg/11065/1130102-454.stm>; Elizabeth Gibson, *Dickinson College Students Demand More Changes to School’s Sexual Misconduct Policy*, PATRIOT-NEWS (Mar. 4, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/03/dickinson\\_college\\_students\\_dem.html](http://www.pennlive.com/midstate/index.ssf/2011/03/dickinson_college_students_dem.html).

consequences for anyone involved.<sup>159</sup> In fact, Duke amended its sexual assault procedures just two years later to erode due process rights for the accused.<sup>160</sup>

Fourth, ideology plays a role in sexual assault trials to the increasing detriment of the accused as some universities institutionalize the anti-due-process biases of their administrators.<sup>161</sup> At Stanford, for example, the school training manuals instruct would-be jurors in sexual misconduct cases that “act[ing] persuasive and logical” is a sign of guilt and that “[e]veryone should be very, very cautious in accepting a man’s claim that he has been wrongly accused of abuse or violence.”<sup>162</sup> For some schools, a desire to change societal and cultural attitudes toward sexual violence (or perhaps a simple desire to see what they want to see) can even lead to illegal conduct: the University of California-Davis, for example, was recently caught violating federal law by *over reporting* the number of rapes on campus to the federal government.<sup>163</sup>

The civil and criminal courts do not suffer comparable financial incentives to convict innocent people because there is no statute or enforcement mechanism by which a court could forfeit its funding or pay astronomical sanctions based on the outcome of a trial. Furthermore, protections such as 42 U.S.C. § 1983 (which allows suits for prosecutorial and police misconduct) and the rules of professional ethics give criminal and civil defendants meaningful ways to respond to unfair treatment at the hands of those in power.

Nor do courts suffer from the university’s problem of disciplinarian job security. While prosecutors are undoubtedly sensitive to the political impact of high-profile litigation, election cycles or appointment regimes protect them and the judges who try their cases from instant accountability to unpopular sentiment. Jurors, who are not repeat players in the justice system, are also always free to do what is right instead of what is popular. Even if the political environment in which universities operate could be reformed, it is unclear how to ameliorate the impact of a student affairs officer’s career concerns while letting colleges adjudicate sexual violence. Who would an official be accountable to if not the institution directly? In the informal world of academia, how could insulation of the ultimate decision maker be credibly assured?

Similarly, as to reputational or ideological interests, the justice systems already mitigate the impact of individual and institutional biases by diffusing power and responsibility among a number of different people, including legislators, trial judges, appellate judges, jurors, advocates and police

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<sup>159</sup> See K.C. Johnson, *Where Are They Now?*, DURHAM-IN-WONDERLAND (Nov. 05, 2007, 12:01 AM), <http://durhamwonderland.blogspot.com/2007/11/where-are-they-now.html>.

<sup>160</sup> *New Duke Policy Renders Students Unwitting Rapists; Removes Protections for Those Accused of Sexual Misconduct*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 7, 2010), <http://thefire.org/article/11730.html>; *Duke University: Overbroad and Unjust Sexual Misconduct Policy*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/821.html> (last visited Nov. 22, 2012) (linking to all of FIRE’s materials on the case).

<sup>161</sup> See Greve, *supra* note 10, at 537 (“[A] fair hearing on sexual harassment charges is out of the question. At best, the case will be heard by faculty members or administrators whose incentives – in the form of federal regulations and pressure from campus agitators – uniformly cut in the direction of convicting . . . ; the less fortunate . . . will be asked to appear before a panel of ideologues and equal opportunity officers with an institutional interest in maximizing the number of convictions. Either way, a conviction is a foregone conclusion.”).

<sup>162</sup> Mike Armstrong and Daniel Barton, Op-Ed, *A Thumb on the Scale of Justice*, STANFORD DAILY (Apr. 29, 2011), <http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/>; *Stanford University: Biased Sexual Misconduct Procedures and Unjust Guilty Finding*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/869.html> (last visited Nov. 22, 2012) (linking to all of FIRE’s materials on the case).

<sup>163</sup> Jennifer Epstein, *Overreporting Sexual Assaults*, INSIDE HIGHER ED. (Oct. 2, 2009), <http://www.insidehighered.com/news/2009/10/02/davis>.

officers. The division helps curb the biases of any one actor or the reputational interests of those who are accountable to the public, such as a prosecutor up for reelection.

By contrast, “[a] university administrator may – and frequently does – fill all the roles of police (enforcing rules and identifying those who break them), prosecutor (deciding who should be charged for breaking the rules), judge (agreeing who should be charged for breaking the rules and deciding on fact-finding procedures), and jury (deciding if the individual is guilty as charged). By melding all of these roles in one person, these functions no longer check one another.”<sup>164</sup> Hiring additional personnel to fulfill all of these roles would be prohibitively expensive, and there is no guarantee that it would adequately solve the problem.

Furthermore, while any procedural reforms on campus would have to start largely from scratch, the justice systems already mitigate the risk of undeserved punishment through effective safeguards. Here, too, there is an important separation of powers protection: no individual courtroom is allowed to establish its own Rules of Evidence or Civil/Criminal Procedure in the midst of a given case, but rather all must conform their practices to rules set out by a different organization long before a controversy arises. Colleges, by contrast, currently are not required to have rules of evidence at all.<sup>165</sup> Because a college can tailor its procedures to the facts of a given case, colleges have the power to make outcome-determinative evidentiary rulings and have done so to the detriment of accused students.<sup>166</sup> Universities also have no obligation to disclose relevant or exculpatory evidence to the accused, and there are no rights to discovery.<sup>167</sup> The procedures governing college adjudications do not even meet the minimal standards for administrative due process, for there is no ban on secret *ex parte* communications between a complainant and the ultimate decision maker.<sup>168</sup> Rather than try to reinvent the wheel on campus, colleges should leave sexual assault adjudication to institutions with procedures that are already in place.

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<sup>164</sup> Picozzi, *supra* note 59, at 2141-42 and n.50. See also *Smith v. Denton*, 895 S.W.2d 550, 555 (Ark. 1995) (“Throughout the proceedings, Dr. Smith acted in a variety of often-conflicting capacities. He was at once investigator, prosecutor, witness, and judge.”). Such a system is not fair, *cf.* *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) (Scalia, J., concurring) (citations omitted) (“That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials.”), and at odds with America’s philosophy of government, see *MONTESQUIEU, SPIRIT OF THE LAWS XI, available at* [http://www.constitution.org/cm/sol\\_11.htm](http://www.constitution.org/cm/sol_11.htm).

<sup>165</sup> *E.g.*, *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983). As discussed in Part II(C) *supra*, however, the federal government has recently begun establishing a pro-complainant “Rules of Evidence” for campus sexual assault trials that could be unconstitutional.

<sup>166</sup> University tribunals have considered such credible evidence as a one-month-after-the-fact determination that a complainant “looked like a rape victim,” *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 384 (Mass. 2000) (Ireland, J., dissenting), or the unverified hearsay testimony of anonymous secret witnesses, *Fraad-Wolff v. Vassar Coll.*, 932 F. Supp. 88, 92 (S.D.N.Y. 1996), while ignoring evidence that the accused was medically incapacitated on the day he allegedly committed sexual harassment, *Yusuf v. Vassar Coll.*, 35 F.3d 709, 712-13 (2d Cir. 1994).

<sup>167</sup> See *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 18 (D. Me. 2005). *Gomes* even approved the school’s giving evidence to the complainant but not the accused, *id.* at 19-22, while in criminal court the prosecution has to disclose all exculpatory evidence to the defense, see *Brady v. Maryland*, 373 U.S. 83 (1963). Civil courts, similarly, have mechanisms for compelling the disclosure of evidence and for punishing the failure to do so. See, *e.g.*, *FED. R. CIV. P.* 37.

<sup>168</sup> See *Indiana University, OCR Complaint No. 05-06-2138* (Mar. 6, 2007) (finding insufficient evidence of a Title IX violation, and thus finding that the grievance procedures were “equitable,” despite the fact that the Dean of Students unilaterally lengthened the accused’s suspension from one summer to a full year after the Dean “talked to [the complainant’s] father” and received an *ex parte* letter from the complainant). Even in administrative hearings under the Administrative Procedure Act, *ex parte* contacts of this type are strictly forbidden. 5 U.S.C. § 557(d) (2006).

In summary, colleges currently suffer from four interests that negatively impact treatment of the accused (financial, job security, reputational, and ideological), each of which would be difficult if not impossible to remedy and all of which are at least mitigated to a greater extent by the U.S. court systems. Accordingly, courts should be the venue for handling cases of sexual misconduct on campus.

## **B. The Prevalence of Sexual Assault on Campus and the Nature of College Discipline Do Not Change the Analysis**

Six arguments sometimes arise from complainant advocates, university officials, and judges as to why college discipline for rape or sexual assault should continue as is or with minimal modification even in light of the risk of unfair punishments. All six are unpersuasive. Each will be addressed in turn below.

### **1. Colleges must adjudicate sexual assault claims as part of their obligation to provide a learning environment that is free from sex discrimination.**

While schools unquestionably have both a moral and legal obligation to provide a non-discriminatory educational environment, it does not logically follow that they must be empowered to investigate and prosecute rape and sexual assault themselves. As OCR recognized in its opinion letter in the Buffalo State College case, a school that immediately informs criminal authorities of alleged criminal conduct and cooperates in the subsequent investigation has met its obligation.<sup>169</sup> If a jury finds the accused guilty after a fully impartial trial with attendant procedural safeguards, the school can then take disciplinary action of its own.<sup>170</sup> For closer cases in which prosecutors refuse to indict, a school that informs both the complainant and the accused of their rights in civil court could also be said to have acted appropriately. Separating the obligation to avoid discrimination based on sex with the actual adjudication of a sexual assault claim simply conforms policy to a college's limited institutional competence. Much as with murder, arson, or any other felony equivalent crime, colleges cannot and should not be allowed to play the roles of amateur police department and District Attorney's office with their student body. An accused should only be subject to supplemental discipline for these offenses after a full criminal or civil adjudication with procedural safeguards.

In discussing a school's obligations under Title IX, supporters of the statute often reference Title VII, which prohibits sexual harassment as a form of sex discrimination in the workplace. If colleges have to adjudicate claims of sexual violence between their employees, the thinking goes, they should also have to do so for claims between their students. There are at least three reasons

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There is at least anecdotal evidence that this practice is quite common in the informal world of academia. *See* LEWIS, *supra* note 146, at 169 ("Far more than in any other area of student life, students and parents resorted to manipulation and anger to influence the course of [acquaintance rape] procedures."). Without discovery or *voir dire* procedures, accused students cannot uncover these contacts.

<sup>169</sup> *See* Buffalo State College, OCR Complaint No. 02-05-2008 (Aug. 30, 2005).

<sup>170</sup> Of course, a university must have some authority to take emergency measures to protect its campus in certain cases such as when a student's presence poses an imminent risk to his or her classmates. As with temporary restraining orders and preliminary injunctive relief in civil litigation, however, there must also be some mechanism for timely and impartial review of the university's exercise of its emergency authority and some method by which the university's administrators can be penalized if they abuse it.

why that argument is incorrect. First, Title VII deals with norms in an adult professional setting; Title IX, by contrast, applies in dormitories and other non-work settings, making any analogy between the two statutes or comparison of their precedents “inapposite.”<sup>171</sup> Second, while Congressional statutes cap damages in Title VII suits, Title IX allows for unlimited recovery and thus significantly increases the statute’s ability to incentivize a university adjudicator.<sup>172</sup> Finally, while most states allow tort claims for wrongful discharge for accused employees as a *de facto* counterweight to Title VII, there are few counterweights for accused college students to sue for wrongful sanction, forced leave of absence, or expulsion as explained *supra* Part III(B). Accordingly, Title IX should not authorize colleges to adjudicate allegations of sexual violence even if Title VII would.

## **2. Sexual assault is a highly underreported and serious problem on campus.**

One utilitarian theory argues that colleges must handle sexual assault because doing so will bring more justice in the aggregate; it posits that many victims will not come forward otherwise, and the problem is massive in scale. The theory concedes that colleges will occasionally convict innocent people, but argues that such is the price to be paid for empowering survivors.

There is a difficult tension in sexual assault adjudication between avoiding the injustice of a wrongful conviction and avoiding the injustice of a wrongful acquittal, and no system is likely to ever get all cases right. Nevertheless, any process designed to resolve such claims can only be legitimate if determining guilt or innocence is the first priority. Justifying institutionalized unfairness to a given defendant in the exercise of power because of a perceived need to reform a broader social problem is contrary to the very idea of civilized justice. Adjudications “are supposed to be about individuals, not symbols; over facts and evidence, not social theories; [and] over guilt or innocence, not social transformation.”<sup>173</sup>

Even if sexual assault is as underreported as complainant advocates claim,<sup>174</sup> and while recognizing that sexual violence is reprehensible, convicting the innocent to atone for society’s sins or to bring about change remains an unjustifiable use of authority and a dangerous judicial precedent.

## **3. Complainants do not lie or make mistakes when reporting sexual assault.**

Critics of changing the present system often argue that instances of false or mistaken accusations are not frequent enough to require colleges to burden meritorious complaints with excessive due process hurdles to overcome. Upon closer examination, such an argument made alongside the claim that sexual violence on campus is grossly underreported contradictorily posits

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<sup>171</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 675 (1999) (Kennedy, J., dissenting).

<sup>172</sup> *Id.* at 668.

<sup>173</sup> Greve, *supra* note 10, at 541.

<sup>174</sup> For arguments that there is no evidence of underreporting, and for critical analysis of social science research purporting to prove otherwise, see Heather MacDonald, *The Campus Rape Myth*, CITY J. VOL. 18 No. 1, 22-33 (2008), available at [http://www.city-journal.org/2008/18\\_1\\_campus\\_rape.html](http://www.city-journal.org/2008/18_1_campus_rape.html); Young, *supra* note 50; Chad Herman, *One-in-One-Thousand-Eight-Hundred-Seventy-Seven*, PITTSBURGH POST-GAZETTE (Feb. 28, 2011), <http://communityvoices.sites.post-gazette.com/index.php/opinion/the-radical-middle/27667--one-in-one-thousand-eight-hundred-seventy-seven>.

that complainants are very often wrong in claiming they have *not* been raped,<sup>175</sup> while rarely incorrect in claiming that they *have* been raped.

Although it is true that society should strive to make justice readily available for rape victims, the argument that alleged victims are rarely incorrect cannot support the current college adjudication system. The most obvious problem is that because the precise rate of false or mistaken reporting is unknowable,<sup>176</sup> the argument has no empirical support. In addition, it is indisputable that false complaints do happen: using OCR's "preponderance of the evidence" standard in determining whether probable cause exists, police concluded in 2010 and 2011 alone that a university complainant makes a false rape allegation more than once per calendar month.<sup>177</sup> Relying on the good faith or accuracy of complaints does not protect the innocent in these situations, regardless of how often they happen.

#### **4. Because discipline is an educational experience without criminal consequences, it does not require procedural protections.**

Some university administrators claim that because a college judicial proceeding does not involve a loss of liberty, as could a criminal trial, it should not be subject to due process. They also say that procedural restrictions impede adjudication's effectiveness as a tool for educational development because discipline is supposed to be cooperative, not adversarial.<sup>178</sup>

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<sup>175</sup> Surveys estimating the statistical prevalence of rape on college campuses almost always reclassify a number of responses as rape even though the actual respondents claim to have not been raped. See Macdonald, *supra* note 174; FISHER ET. AL., *supra* note 40, at 15 (noting that half of those it counted as victims of actual or attempted sexual violence to arrive at its famous "one in four" statistic did not classify themselves as such, while also acknowledging that the study plays such definitional games as defining "attempted rape" to include receiving a verbal rape threat). Fisher et al. freely acknowledge that there has never been a longitudinal study tracking a class of students from start to finish, as opposed to a statistical sampling employing questionable methodology, proving that one in four college women will be sexually assaulted during their time in school. *Id.* at 37 n.18.

<sup>176</sup> There is no evidence that only two percent of rape claims are false. Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 971 (2000). See also Anderson, *supra* note 70, at 984-86 (discussing the debate over the number of false reports).

<sup>177</sup> There were twenty-five cases (and possibly more) in 2010 and 2011 in which police determined that university students had filed false complaints. In roughly half, complainants recanted their stories or admitted their allegations were untrue. Also in roughly half, police filed criminal charges against the complainant. Articles concerning false accusations at the following universities are on file with the author and are also searchable via Google: Dartmouth, Texas A&M, McNeese State University, George Fox University, Oregon State University, Messiah College, Seton Hall, Goshen College, Otterbein University, Arkansas Tech, Marshall University, The University of Georgia, The University of Northern Iowa, Plattsburgh State, The University of South Dakota, The University of Delaware, South Dakota State University, Indiana University at Bloomington, The University of Cincinnati, The University of North Dakota ("UND"), Penn State, Elon University, Oakland University, Purdue, and Spring Arbor University. The case at Penn State occurred in March 2010 and does not involve the child sexual abuse scandal from November 2011. *University Police: Alleged Rape on Campus Did Not Happen*, PENN STATE LIVE (Mar. 2, 2010), <http://live.psu.edu/story/44931>. For over a year, UND refused to reconsider its conviction of an accused student even when informed that the police had charged the complainant with filing a false rape report. *Victory for Due Process: Student Punished for Alleged Sexual Assault Cleared by University of North Dakota; Accuser Still Wanted for Lying to Police*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/article/13758.html>; *University of North Dakota: Accuser is Criminally Charged with Lying to Police, But School Refuses to Reopen Misconduct Case*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/868.html> (last visited Nov. 22, 2012) (linking to all of FIRE's materials on the case).

<sup>178</sup> See Donald D. Gehring, *The Objectives of Student Discipline and the Process that's Due: Are They Compatible?*, NASPA JOURNAL Vol. 38 no. 4 at 477 (2001), available at <http://journals.naspa.org/jsarp/vol38/iss4/art6/>



As to claims about possible sentences, civil trials have procedural rules that a college does not replicate even though civil courts resolve purely private disputes. Furthermore, given the substantial economic impact of being denied a college degree<sup>179</sup> and the stigma that comes with being branded a convicted rapist,<sup>180</sup> a university's disciplinary sanctions such as suspension, expulsion, and a negative notation on a transcript that could preclude admission to other programs or future jobs are serious enough to warrant procedural protections. Finally, the fact that a campus disciplinary proceeding does not carry a jail sentence does not excuse the need for it only to punish the guilty. There is no legitimacy in a system that does not fairly resolve claims, regardless of what the punishment is.

As to the argument about discipline as a teaching tool, educational objectives do not excuse the need for procedural safeguards because students cannot learn anything from being punished for offenses they did not commit. More importantly, even if the university is correct about discipline in other contexts, "a case involving student-on-student sexual misconduct is per se adversarial" and never cooperative.<sup>181</sup> As such, it should be left to an adversarial system.

## 5. Due process interferes with academic freedom.

Judges typically use a variation of this reasoning when refusing to closely scrutinize university discipline.<sup>182</sup> The federal executive branch, however, does not have similar reservations about reviewing a college's proceedings. Today, OCR is permitted to second-guess the grades a school gives to a complainant if he or she suffered sexual harassment in a context totally unrelated to the class.<sup>183</sup> In light of the change that Title IX has wrought, the judiciary's quixotic

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("[P]rocedures [which] incorporate the right to counsel, confrontation and cross-examination of witnesses and multiple appeals . . . are confusing to students [and] preclude the 'opportunity for developmental efforts' . . . and even ' . . . create an adversarial atmosphere likely to produce harsher, not more lenient results.'" (citations omitted). Disciplined students do not tend to share the university's perspective. *See* Picozzi, *supra* note 59, at 2150 ("There's nothing magically collegial about a university; once a student is charged, a full-fledged adversarial relationship exists, and university officials are like everyone else. They play to win."); Sarah Lipka, *Most Students Report Satisfaction with Campus Judicial Systems*, CHRONICLE OF HIGHER EDUC. (Mar. 29, 2011), <http://chronicle.com/article/Most-Students-Report/126925> (noting that half of disciplined students did not learn anything from the experience).

<sup>179</sup> *See* Picozzi, *supra* note 59, at 2139 n.41; Jennifer Gonzalez, *Bachelor's Degree is Still Best Path to Middle-Class Jobs and Earnings, Report Says*, CHRONICLE OF HIGHER EDUC. (Nov. 14, 2011), <http://chronicle.com/article/Bachelors-Degree-Is-Still/129784/>.

<sup>180</sup> *See* *Addington v. Texas*, 441 U.S. 418, 424-25 (1979) (insisting on higher burdens of proof "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing").

<sup>181</sup> Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for 'Fundamental Fairness' in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 691 (2001).

<sup>182</sup> *See, e.g.,* *Osteen v. Henley*, 13 F.3d 221, 225-26 (7th Cir. 1993); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000).

<sup>183</sup> *See* 2001 GUIDANCE, *supra* note 14, at 16-17 (requiring schools to consider a number of remedies for a harassed student, including recalculating grades without certain quizzes or tests factored in); Indiana University, OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (noting that a complainant in a student-to-student sexual assault case was granted "quite extraordinary" academic relief, including the changing of a C+ grade to a B- and changing three grades of "D" and one "Incomplete" to "W" for withdrawn, despite the fact "that students are generally not permitted to 'withdraw' from courses they have completed."); Vermont Law School, OCR Complaint No. 01-06-2045 (Dec. 1, 2006) (allowing the complainant to complete half of her law school education at another institution as a result of an alleged student-to-student sexual assault). By contrast, judicial deference in matters of academics is well established. *See, e.g.,* *Regents of the Univ. of Mi. v. Ewing*, 474 U.S. 214, 222-28 (1985); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978).

unwillingness to get more involved in university discipline only fosters an imbalance of power that leads to false convictions.

More fundamentally, however, nothing about academic freedom requires giving a university the power to adjudicate claims of felony crime between its students. If anything, removing sexual assault adjudications from colleges will increase academic freedom by limiting the government's reach into how the university is doing its job.

## **6. The criminal and civil justice systems are too slow or otherwise inadequate in their response to sexual assault on campus.**

The civil and criminal justice systems have a long and deplorable history of insensitivity toward crimes of sexual violence. Fortunately, they have experienced significant overhaul since the 1970s.<sup>184</sup> While critics will undoubtedly argue that much work remains to be done, courts are in a much better position to resolve these allegations than they once were. If the judiciary is still not up to the task, efforts should be focused on reforming its processes to make them effective for all assault survivors. Proposals such as creating a “fast track” system for the adjudication of claims of sexual violence on campus could make the courts an even more effective method of resolving these claims, as such changes would prevent survivors from having to sacrifice their college careers waiting for justice to be served.

## **V. Conclusion**

Because of Title IX, educational institutions face numerous incentives to wrongfully convict in cases of alleged sexual violence on campus. OCR, with the power to terminate all federal funding to a university behind its words, has issued guidance documents and publications that increasingly press for complainant rights while ignoring the plight of innocent accused students. Courts, similarly, have expanded a university's exposure to suits from dissatisfied complainants while taking little if any interest in the pleas of those who claim to have been wrongfully disciplined. In the coming years, as the April 2011 Letter makes its impact felt on campuses nationwide, false rape convictions will increase substantially due to the desire of colleges and universities to placate OCR and avoid potential liability from dissatisfied complainants at the expense of just and fair adjudication of student cases. As best expressed by one federal judge in a 2012 lawsuit, “from a normative perspective, the process applied to [the alleged attacker] and the behavior of University officials in investigating and prosecuting [a claim of sexual assault] offends the court's sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused.”<sup>185</sup>

Thus, America stands at a crossroads: will the reality of disparate justice on campuses that Title IX has wrought continue without correction? Can colleges adjudicate sensitive claims of interpersonal violence and counterclaims of innocence in light of the inherent financial and self-preservation conflicts of interests looming over the outcome?

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<sup>184</sup> See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008).

<sup>185</sup> Order Under Seal at 12, *Doe v. Univ. of Mont.*, Case 9:12-cv-00077-DLC (D. Mont. May 10, 2012), available at [http://missoulain.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf\\_683eaa12-c0c6-11e1-8193-001a4bcf887a.html](http://missoulain.com/unsealed-document-from-federal-civil-rights-lawsuit-against-university-of/pdf_683eaa12-c0c6-11e1-8193-001a4bcf887a.html) (page 196 of 281).

Quite simply, the law must recognize that a university (like any institution) has limits. Society must assign the adjudication of sexual assault to civil and criminal court systems to ensure justice for all concerned.